THE DEVELOPMENT OF ISLAMIC JURISPRUDENCE (FIQH) AND REASONS FOR JURISTIC DISAGREEMENTS AMONG SCHOOLS OF LAW

by

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Summary

Islāmic Jurisprudence comprises of the laws that govern a Muslims daily life. The Prophet Muħammad explained and practically demonstrated these laws. The jurists studied the Qur'ān and the Prophet's life and they adopted a refined methodology which they used to extract legal rulings and verdicts. This methodology is known as the Principles of Jurisprudence.

The jurists expanded on this methodology with some differences among them on the usage and the application of some aspects as acceptable forms of evidence.

Eventually, the Muslim world was left with four schools of jurisprudence that are present to this day. There are differences between these schools on some issues but these differences never caused conflict, instead it provided us with a wealth of knowledge.

We need to study these schools and its principles together with the objectives and intent of the Sharīʿah and utilize this to find solutions to all new issues that arise.

The following are some of the commonly used words:
Islamic Jurisprudence (*Fiqh*), *Ijtihād*, Imām, Sharīʿah, Consensus (*ijmāʿ*), Analogy (*qiyās*), Public Interest and Welfare (*maślaħah mursalah*), Ħadīth, Qur'ān, jurist (*faqīh*), jurisconsult (*muftī*), legal verdict (*fatwā*).

Transliteration

In transliterating Arabic words the following system has been used:

Acknowledgement

All praise is due to Allah who in His mercy has endowed me with the ability to complete this work on Islamic Jurisprudence.

The Prophet Muħammad (may the peace and blessings of Allah be upon him) is reported to have said, “He who does not thank man has not thanked Allah.” With these words in mind I am grateful to the following people.

- I thank my supervisor Professor Yousuf Dadoo for his support and guidance.
- I thank the immediate members of my family, my wife and parents for their support.
- I am grateful to my teachers and colleagues.

May Allah reward you greatly.

Shoayb Ahmed

Contents

Introduction

Statement of the Problem

Islamic Jurisprudence (*Fiqh*) is probably one of the most important aspects in the life of a Muslim, because it provides the individual with the rulings for the practical aspects of his daily life. From the moment a person awakes, issues related to personal hygiene, *Śalāt*, business, marriage, divorce, fasting, *Ħajj*, *Zakāt*, Laws of Succession, issues related to the Judicial System and the Laws that govern the citizen and his role and the role of the state merit attention.

It is for this reason that we find the Qur'ān and the Ħadīth addressing the importance of Islamic Jurisprudence, by instructing us even at the time of *Jihād* to have a group of people who continue to delve into and study *Fiqh* so that they are able to guide the remainder of the community and the fighters on their return.

In the Ħadīth, we find statements from the Prophet Muħammad on the importance of *Fiqh*: "When Allah intends good for a person than He grants him the understanding (*Fiqh*) of *Dīn*". (*Al-Bukhārī* and *Muslim*)

It is for this reason, we find that the *Śaħābah* (companions of the Prophet) and the subsequent legal scholars went to great lengths for applying certain methodologies in deducing laws and rulings from the sources of the Sharīʿah. The first known work on this subject, also known as *Uśūl-Fiqh* is *Al-Risālah* by Imām Al-Shāfʿī.

The situation continued until we were left with the four documented schools of law that are adhered to by majority of Muslims to this day. Over the centuries scholars produced monumental works in Islamic Jurisprudence (*Fiqh*) that included *Fatħ Al-Qadīr* and *Ħāshiyat* Ibn ʿAbidīn in the Ħanafī School, *Al-Dhakīrah* in the Mālikī School, *Al-Majmū'* and *Al-Ħāwī* in the Shāfiʿī School and *Al-Mughnī* in the Ħanbalī School.

This continued until there was a claim made by some that the doors of *Ijtihād* had been permanently closed. Due to a lack of understanding of the above statement, more recently, there has been an attempt by certain sectors including some scholars to dissociate themselves from the four schools of law.
This trend is manifested in the claim by a group who outwardly profess to rely on the Qur'ān and the Sunnah alone, as this is a Muslim obligation. They maintain that Muslims have not been commanded to follow a school or view of some individual other than that of the Prophet.

Another group maintains that in the spirit of progressiveness, Muslims are not limited and confined to the four schools of jurisprudence (*madhhabs*). We need to renew and possibly 'rewrite' our *Fiqh*.

The ensuing result is that both groups wish to abandon the schools of jurisprudence: the first by adopting an apparently 'traditional' approach and the other by a 'modern' or 'contemporary' approach.

In my research, I intend focusing on the Development of Islamic Jurisprudence (*Fiqh*) from the Prophet's time, the period thereafter and the subsequent formation of the schools of law and brief discussion on their methodologies. The period thereafter will also be discussed until our present day. I will try to highlight the various factors that influenced *Fiqh*.

The research is divided into six chapters.
Chapter One deals with the definition of *Fiqh* and its importance as well as the definition of *Ijtihād* and its prerequisites.

Chapter Two discusses the first stage in the development of *Fiqh*, the foundational period at the time of the Prophet Muħammad. It looks into the responsibility of providing solutions for various issues that arose at the time.

Chapter Three deals with stage two in the development of jurisprudence, commencing from the rightly-guided *Khalīfs* until the end of the second century.

Chapter Four looks at the legal scholars of the four schools of law and their contribution to their respective schools by the end of the fourth century.

Chapter Five is a discussion of the period when the four schools of law were firmly rooted within the Muslim society and different scholars of Islamic Jurisprudence wrote lengthy encyclopaedic works elucidating issues within their schools. This period is from the fifth century to this day when the different *Fiqh* Academies in some way fulfill the role of a kind of collective *Ijtihād*.

In Chapters Two to Five, I will mention names of some prominent scholars (Jurists) and their books or some of their contributions to the state of *Fiqh* in their respective eras. For this I relied on the many biographical works of the scholars in general like *Siyar A'lām Al-Nubalā* by Al-Dhahabī and books dedicated to the scholars of a specific school of law like *Ṭabaqāt Al-Shāfi'iyah Al-Kubrā* by Al-Subkī. For the scholars of more recent times, I relied on *Al-'Alām* by Al-Zarkalī and my own research of some 150-200 biographies of scholars in the Muslim World and their books.

Chapter Six deals with some common reasons for disagreement amongst the Jurists. These reasons are not confined to any specific era but could have been instrumental factors in any one or more stages.

In my conclusion, I wish to point out that by understanding the processes Islamic Jurisprudence underwent through together with the reasons for disagreement, we will appreciate our legacy of *Fiqh* and realize that we need to remain within the boundaries of the four schools of law. We will also understand that the doors of *Ijtihād* were shut for all matters that have already been dealt with by the

Mujtahid scholars. Thus, there is no need for reinventing the wheel. However, *Ijtihād* is essential in all new issues like the Islamic ruling on cloning etc.

The issue then is not about abandoning the schools of law, instead we need to possibly look at ways to teach *Fiqh* that would enable the scholar to apply himself in any new issue that arises.

It is in the examination of the contemporary juridical scene that this work aims to make a fresh contribution.

Chapter One

Fiqh: definition and importance

1.1 *Fiqh* or Islamic Jurisprudence as we know it has been literally defined as "to understand".[1] The Qur'ān also uses it with this meaning in Sūrah Al-A'rāf, verse: 179 "they have hearts wherewith they understand not".

In Sūrah Al-Munāfiqūn, verse: 7 appears the verse: "but the hypocrites do not understand"

Initially *Fiqh* was used in a broad sense that extended to the issues of doctrine and belief. As the science of *Uśūl-Fiqh* (principles of jurisprudence) developed, *Fiqh* became a special subject that dealt with outward practices. Some distinguished between the doctrinal issues by using the term *Fiqh Al-Bātin* and the practical aspects as *Fiqh Al-Zhāhir*

1.2 Technically, *Fiqh* has been defined in various ways by the different scholars of the schools of law, but I will suffice with one comprehensive definition which is common to all. *Fiqh* is the knowledge of the practical laws of the Sharīʿah that are derived and deduced from specific and detailed evidences.[2]

By practical laws of the Sharīʿah, we include all that is required by a Muslim individual in his daily life, which includes *Śalāt*, *Zakāt*, fasting, *Ħajj* (pilgrimage), Marriage, Divorce, Laws of Succession, *Jihād* etc.
Through the above definition, we have excluded ethical issues that concern the heart like sincerity, hatred, anger, pride and many others. The laws with regard to belief have also been excluded.

1.3. The Importance of Islamic Jurisprudence (*Fiqh*)

Human beings have been created by Allah to serve Him and to create an environment wherein the word of Allah is upheld. Thus every Muslim in particular must be well aware if he/she is leading his/her life in conformity to Allah's orders and wishes. This then, shows us the importance and need for *Fiqh*.

This is further supported by verse: 122 in Sūrah Al-Tawbah wherein Allah says; "It is not proper for the believers to go forth (in *Jihād*) all together; there should be a group from every band that goes out (in *Jihād*), which remains behind acquiring an understanding in matters of their religion *(li yatafaqqahū*), so that they are able to admonish the others on their return, so that they will guard themselves (against evil)". This verse clearly illustrates to us that even in a noble act like *Jihād*, some people ought to be excluded for the sole purpose of learning and understanding their Dīn so that they may be in a position to warn others. These people are the Jurists (*fuqahā* plural of *faqīh*-jurist)

In addition, numerous *Aħādīth* of the Prophet reaffirm the importance of *Fiqh* and its position in the life of a Muslim. The Prophet Muħammad said, "When Allah intends good for a person, then He grants him the understanding of *Dīn*".[3] The word *yufaqihhu* is used in this Ħadīth which clearly refers to an insight and understanding in matters of religion.

The various laws that govern a person's daily life were learnt by the companions from the Prophet and they held on to these during their expeditions beyond the Arabian peninsula. The Laws of *Fiqh*, thus in some way served as a uniting factor between different peoples because they were governed by common laws.

This being the case, we find that the Arabs prior to Islam were largely an illiterate nation but they possessed that amount of knowledge that was necessary for them to conduct their daily mundane lives like being able to navigate using the stars as well as those aspects that concerned their camels and horses.

There were certain practices and forms of worship that had been passed down to them from previous generations which changed from time to time. They were acquainted with *Ħajj* although they performed it a different manner. They also observed fasting as Allah mentions in the Qur'ān, "Fasting has been prescribed upon you as it was on those before you so that you may become pious and God-fearing".[4] They were acquainted with certain aspects related to marriage and divorce as is evident from the Ħadīth.[5]

However, their knowledge of ethical and spiritual matters was far from sufficient to govern their daily lives; instead it was mere remnants of the teachings of the Prophet Ibrāhīm and his son, the Prophet Ismāʿīl. With the result the word *Fiqh* or *Fuqahā* is not reported to have been used by them in the context mentioned above. Instead, it was Islam that gave it a specific meaning with reference to a particular science or discipline as explained in the technical definition.

Islamic Jurisprudence (*Fiqh*) was compiled relatively quickly when compared with the Romans. In addition, it provided guidance in religious acts of worship and in worldly matters. Conventional law governed the individuals relationship with fellow man and not his relationship with his Creator. Because *Fiqh* in essence is based upon revelation, obedience to it is obedience to the Creator and acting upon it would result in reward from Allah, while neglecting it or abandoning it is a sin and could render a person liable for punishment.

1.4. *Ijtihād* and the *Mujtahid*

The word *Ijtihād* is derived from the root letters *jahada* which means to strive and exhaust oneself. Thus literally it refers to one who exhausts himself in trying to achieve a goal.[6]

The scholars of *Fiqh* have defined *Ijtihād* as "when a scholar or *faqīh* exerts his abilities in order to ascertain a speculative Sharīʿah ruling".[7]

Ijtihād will be valid in cases where there are no clear texts (*nuśūś*) that prescribe the injunction. The texts that are speculative either in authenticity or in meaning as well as those sources of the Sharīʿah that are conceptually flexible in nature are domains of *Ijtihād* which will include *Qiyās* (analogy), *Istiħsān* (juristic preference) and *Maślaħah Mursalah*(public welfare).

The person who exercises *Ijtihād* is referred to as a *Mujtahid*. He is thus the person who has the ability to derive laws from the sources of the Sharīʿah. The scholars of *Uśūl-Fiqh* have stipulated certain prerequisites for the *Mujtahid* over and above his being a mature, sane, intelligent and competent Muslim scholar.[8]

(1) He must be proficient in the Arabic Language to such an extent that he is able to comprehend and deduce rulings and injunctions from the Qur'ān and Sunnah. This includes a thorough understanding of grammar, epistemology, rhetoric, linguistics as well as the nature of the language at the time of revelation.

(2) He must have a sound working knowledge of the Qur'ān and the Sunnah and its respective sciences. With regard to the Qur'ān, he must be knowledgeable in the Science of the Qur'ān that entails being able to distinguish between Makkī and Madanī verses, abrogation and particularly the verses that contain injunctions. With regard to the Sunnah, he must be very familiar with grading and categorisation of the Ħadīth, the nature of the narrators and the incidences of abrogation. He must be able to infer and deduce rulings from the Sunnah.

(3) He must be very well acquainted with *Uśūl-Fiqh* (principles of jurisprudence) of the Sharīʿah, because this is the tool that will enable and regulate his ability to deduce injunctions from the Qur'ān and Sunnah. If he has a mastery over this subject, then he will see the need to be familiar with the *Ijmā*' (areas of consensus of the *Mujtahid* scholars) so that he does not issue any ruling that is contrary to *it*. Through this science, he will be able to utilize *Qiyās* (analogy), *Istiħsān* (juristic preference), public welfare and ʿ*Urf* (custom). He will also know the intent and implications of words or phrases, thus differentiating between that which is specific (ʿ*āam*) and that which is absolute (*khāś*). In short, this science provides the legal scholar with the tools for *Ijtihād*.

The *Mujtahid* must be very familiar with the objectives (*maqāsid*) of the Sharīʿah that includes a profound understanding of how the Sharīʿah strives to protect the five basic essentials; life, religion, wealth, intellect and lineage. He would then be able to distinguish between the necessary and essential (*đarūriyāt*), the required and complementary (*ħājjiyāt*) and the additional embellishments (*taħsīniyāt*). He must be conversant with and be able to apply the general *Fiqh* maxims in such a way that enables him to deduce rulings with more ease and precision.

(4) Many scholars have included the need for divinely endowed knowledge which some have sourced from verse 200 in Sūrah Al-Baqarah, "Fear Allah, and Allah will teach you". [9]

1.5. Validity of *Ijtihād*

I will suffice with two examples from the Sunnah as proof for the validity of *Ijtihād*. In the first Ħadīth the Prophet Muħammad said, "When a Judge applies himself (*ijtihād*) and arrives at a correct decision, then he is granted two rewards, but if he applies himself (*ijtihād*) and errs, then he would still get one reward".[10]

The second example is the famous Ħadīth when the Prophet Muħammad sent his companion Muāʿdh ibn Jabal to Yemen. The Prophet questioned him, "How will

you rule?" Muāʿdh replied: "I will rule by the Book of Allah". The Prophet then asked him, "What if you don't find it in the Book Of Allah?" He (Muāʿdh) said, "I will rule by the Sunnah". Again the Prophet asked, "What if you don't find anything in the Sunnah?". He replied: "I will apply myself (*Ijtihād*)" [11]

This Ħadīth establishes *Ijtihād* and outlines the methodology of *Fiqh* and thus forms the basis for later works in *Uśūl-Fiqh*. It also shows that deducing laws is a process, and not a haphazard exercise. This will become more apparent in the ensuing chapters wherein the development of Islamic Jurisprudence (*Fiqh*) is discussed.

Notes for Chapter One

1. Al-Fayrūz Abādī, 1996. *Al-Qāmūs Al-Muħīt,* Beirut, Muassasah Al-Risālah, p.1614

2. Al-Binānī, *Ħāshiyat Al-Binānī ' alā Al-Maħalli ' alā Jami' Al-Jawāmi'*, Beirut, Dār Al-Fikr, vol.1, p. 42

3. Al-Bukhārī, *Śaħīħ Al-Bukhārī*, *Kitāb Al-'Ilm*, Ħadīth no. 69, Riyadh, Dār Al-Salām Publishers

4. Qur'ān S.2 v. 183

5. Al-Nisāī, *Sunan*, *Kitāb Al-Nikāħ*, Also Ibn Mājah, *Sunan*, Ħadīth no. 1952, Riyadh, Dār Al-Salām Publishers

6. Al-Fayrūz Abāđī, 1996. *Al-Qāmūs Al-Muħīt*, Beirut, Muassasah Al-Risālah, p.350

7. Al-Ghazālī, Abū Ħāmid, *Al-Mustaśfā*, Bulāk, Matbaʽh Al-Amīriyah, vol.2, p.350 Also Al-Bukhārī, ʽAlāʽ Al-Dīn ʽAbd Al-ʽAzīz ibn Aħmad, 1991. *Kashf Al-Asrār ' alā Uśūl Al-Bazdawī*, Beirut, Dār Al-Kitāb Al-ʽArabī, vol.4, p.15 Also Aghnides, Nicolas, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography*, Lahore, The Premier Book House, p. 95

8. Al-Bukhārī, ʽAlā Al-Dīn ʽAbd Al-Azīz ibn Aħmad, 1991, *Kashf Al-Asrār 'alā Uśūl Al-Bazdawī,* Beirut, Dār Al-Kitāb Al-ʽArabī, vol.4, p.15-19 also Al-Asnawī, Jamāl Al-Dīn ʽAbd Al-Raħīm ibn Al-Ħasan, *Nihāyat Al-Sūl* fī *Sharħ Minhāj Al-Usūl*, ʽAlam Al-Kutub, vol.4, p.547

9. Al-Suyūtī, Jalāl Al-Dīn, *Risālah Al-Ijtihād*, Cairo, Maktabah Wahbah, p. 7

10. Muslim*,* *Śaħīh Muslim*, *Al-'Aqdiyah*, Ħadīth no. 3240, Riyadh, Dār Al-Salām Publishers

11. Abū Dāwūd, *Sunan*, *Al-'Aqdiyah*, Ħadīth no. 3119, Riyadh, Dār Al-Salām Publishers

Chapter Two

The First Stage in the Development of *Fiqh* – The Period of the Prophet Muħammad peace and blessings be upon him (Developmental and Foundational Stage)

This stage begins when the Prophet Muħammad received revelation at the age of forty in the year 610 until his demise, which extends over a period of 23 years. This period can further be divided into the 13 years before *Hijrāh* and the 10 years thereafter.

Most of the verses revealed prior to the *Hijrāh* concentrated on *Aqīdah* (theology & doctrine) establishing the existence of Allah and responding to the non-Muslims and reaffirming the finality of the prophethood of the Prophet Muħammad in the hearts of the believers. There were however some *Fiqhî* Laws that were revealed that included the obligation to perform the five daily *Śalāt*. [1]

Once the Muslim community had been established in Madīnah after the *Hijrāh*, gradually more and more of the laws were revealed in order to govern the affairs and lives of the individuals and the community and the newly founded Islamic state. During the ten years we witnessed the application and subsequent approval of the four major sources of evidence in Islam and more specifically in *Fiqh*. These sources are the Qur'ān, Sunnah, *Ijmā'* and *Qiyās*.
The ten years in Madīnah was when the very basis of the Sharī'ah was laid by the Prophet. During this time laws were derived from the four sources.
2.1 The first source, the Qur'ān which is the word of Allah revealed to the Prophet Muħammad via the angel Jibrīl and has reached us with an unbroken chain of narrators.[2]

The 6200 verses in the Qur'ān primarily deal with establishing *Aqīdah* (Islamic dogma). It has been reported that the Mālikī scholar, Ibn Al-ʿArabī deduced the laws from about 864 verses while some scholars have estimated the number to be about 500.[3]

The Qur'ān was revealed gradually sometimes in accordance with occurances and incidents. Sūrah Al-Isrā verse: 106 "And (it is) a Qur'ān which We have divided (into parts) in order that you might recite it to men at intervals. And We have revealed it in stages." Very often, if the *Śaħābā* were faced with some issue, they hurried to the Prophet who provided them with the solution or else they waited for revelation from Allah after which they immediately complied.
An example of the *Śaħābā's* questioning is the issue about fighting in the sacred months of *Ħajj*. Allah responded with verse 217 in Sūrah Al-Baqarah, " They ask you concerning fighting in the sacred months…"

As the Qur'ān was being revealed, the Prophet Muħammad read it to the Companions who in turn memorized it and some wrote it down. In this way, it was all written in the Prophet's time, but not in one single book form. Some of the prominent scribes amongst the companions were: Abū Bakr, ʿUmar, ʿUthmān, Alī, Ubay ibn Kaʿb, ʿAbd Allah ibn Masʿūd, Zayd ibn Thābit and others.[4]
However, the compilation of the Qur'ān in a single book form was started as per suggestion from ʿUmar ibn Al-Khaŧŧāb and was finally completed in ʿUthmān ibn ʿAffān's time.[5]

2.2 The second source, the Sunnah which is the statements, actions, acknowledgements and descriptions of the Prophet Muħammad. [6]

We know that the Prophet was sent to teach us the Qur'ān and furthermore his statements and actions are inspired by Allah.[7]

The Prophet sent his emissaries to different parts to teach the people and the *Śaħābā* themselves, as they learned from him they practiced and applied it.

The Qur'ān made five daily *Śalāt* obligatory and the Sunnah specified the method, requirements and conditions etc. Allah says, "Establish *Śalāt*". While in the Ħadīth, we find statements like, "Perform your *Śalāt* in the way you see me make *Śalāt*".[8]

Likewise, about *Zakāt*, regarding which Allah says, "And those in whose wealth there is a recognized right for the one who asks, and for the unlucky who has lost his property and wealth". [9]

But how much must we execute and what is the minimum amount on which *Zakāt* is liable. Again, this is clarified by the Ħadīth:
Narrated by Abū Saʿīd Al-Khuđrī: Allah's Messenger said, "No *Zakāt* is due on property amounting to less than five *ūqiyā* (of silver), and no *Zakāt* is due on less than five *Wasq*".[10]
One *ūqiyā* is equal to 119grams, while one *Wasq* is equal to 60 *Śāa'*. One *Śāa'* is equal to +- 3kg. [11]
Narrated by ʿAbd Allah ibn ʿUmar: The Prophet said, "On a land irrigated by rain water or by natural water channels or if the land is wet due to a nearby water channel, ʿ*Ushr* (one-tenth) is compulsory, and on the land irrigated by the well, half of an ʿ*Ushr* (one-twentieth)". [12]

Likewise, the Prophet's guidance covers issues and aspects relating to fasting, *Ħajj*, marriage, divorce, business etc.
There were many additional rulings that were taught to us by the Prophet in his capacity as the messenger of Allah as we have been instructed in the Qur'ān, "Whatever the Messenger brings to you, then take it, and whatever he prohibits you from, then abstain from it".[13]

What every individual must be aware of is that the Sunnah never contradicts the Qur'ān. Instead, the Sunnah in relation to the Qur'ān can be placed on a few levels.

1. The Sunnah conforms with the Qur'ān.
2. The Sunnah explains and clarifies some verses in the Qur'ān. Eg. The Ħadīth that explained *Zhulm* in the verse in Sūrah Al-Anʿām as associating partners with Allah (*Shirk*).[14]
3. Where the Sunnah contains a ruling on which the Qur'ān is silent.

The Sunnah is only acceptable in matters of Jurisprudence if it complies with certain criteria. It must conform to the rules of authentication that would render it authentic (*Śaħīħ*) or good (*Ħasan*).
Initially, the Companions were not permitted to write anything other than the Qur'ān, but this 'prohibition' did not prevent some of them from writing. These were kept in their possession. It is recorded in *Śaħīħ Al-Bukhārī* that ʿAbd Allah ibn ʿAmr ibn Al-ʿAās used to write and likewise ʿAlī ibn Abī Ŧālib.[15]
These narrations could then be regarded as the first documentation of the Sunnah, particularly those narrations related to matters of jurisprudence. However this was on a small scale. The official and formal process of documentation of the Sunnah began about 100 years after the death of the Prophet. Individual companions had recorded versions of the Sunnah, but the vast majority relied on their memories and they practically demonstrated it in their lives.

The question may then arise as to how were the five juristic legal rulings (*Wājib*-compulsory, *Ħarām*-prohibited, *Mandūb*-desirable and commendable, *Makrūh*-disliked and detestable and *Mubāħ*-permissible) extracted and obtained from the Qur'ān and Sunnah?
We are well aware that the Qur'ān is the speech of Allah and boasts a high level of eloquence and grammatical excellence. Thus the Qur'ān uses various

expressions to denote that something is *Wājib* or *Ħarām*. The following are some examples:
In Sūrah Al-Baqarah, verse: 183, Allah ordains fasting in the month of Ramađān by using the word (*kutiba*). Sometimes the word (*farađa* or *amara*) are used to infer that something is compulsory. This is also achieved from statements that are commands.
While the words (*ħurrima*, *nahā*, *lā yaħillu* etc) are used for *Ħarām*. Prohibition is also achieved from a warning or a promise of severe reproach, curse or Hell as a consequence. An expression that denotes the absence of any reproach or punishment could imply permissibility.[16]

These laws in the Qur'ān and Sunnah are not necessarily as expressed in the books of Fiqh. The implications and intent of the words may vary. Some words are:
'āmm- a text of a general nature which could be applied to many rulings.
khāś- that which is applicable to only one type of ruling.
mujmal- that which requires other texts to be fully understood.
mubayyan- that which is plain and clear and is not in need of other texts.
muťlaq- that which is applicable without any restriction.
nāsikh- that which supercedes previous revealed rulings and abrogates.
naśś- that which unequivocally decides a particular legal question.
zhāhir- that which can contain more than one interpretation.[17]

Thus, many of the scholars of the former period were careful and cautious on pronouncing rulings like *Ħarām*. Instead, they expressed their dislike at something. This is derived from verse 116 in Sūrah Al-Nahl "And say not concerning that which your tongues put forth falsely: "This is lawful and this is forbidden," so as to invent lies against Allah. Verily, those who invent lies against Allah will never prosper."

2.3. *Al-Ijmāʻ* is defined as the agreement and consensus of the *Mujtahids* of the Muslim community after the Prophet Muħammad in a particular era on a specific ruling.[18]

However, this agreement and consensus must be based on the Qur'ān or Sunnah. Thus it was not found as long as the Prophet was alive, since he was the means of resolving all conflict.

Ijmāʻ as a source of Islamic Jurisprudence is based and entrenched in the Qur'ān and Sunnah. Allah says in Sūrah Al-Nisā, verse: 115 "Whoever contradicts and opposes the Messenger after the right path has been shown clearly to him, and follows other than the path of the believers, We shall keep him in the path he has chosen, and burn him in Hell – what an evil destination."

This is further supported by a Ħadīth wherein the Prophet said, "My *Ummāh* will never agree on something that is false and the Hand of Allah (His help) is with the congregation."[19]

There are some scholars who maintain that this agreement was possible in the companions time, but more difficult in the era's that followed because of the difficulty to ascertain the presence of *Mujtahid* scholars in different parts of the world and their agreement on the issue at hand.

Therefore some scholars referred to a general agreement amongst the *Mujtahids* even though one or two were not part of this consensus. This was known as a 'silent *Ijmā*ʿ and was accepted by many scholars.

2.4. *Qiyās* (analogical reasoning) is when we apply the ruling of a former issue to a new issue because of a common reason or factor (*ʿillat*).[20]

The following is an example to illustrate and explain the definition. Alcohol was forbidden by the Qur'ān and the Sunnah. However, we find the intoxicating factor in alcohol on a much larger scale in drugs and other intoxicants. Therefore the former ruling on alcohol is passed on drugs etc. This process is called *qiyās*.

Qiyās was an accepted source in the time of the Prophet and his companions. The Qur'ān alluded to it in Sūrah Al-Nisā, verse: 83 "If only they referred it to the Messenger or to those charged with authority amongst them, the proper investigators would have understood it from them."
The verse uses the word (*Istinbāṭ)* which is to extract and discover which is one of the first levels of *qiyās* and the Prophet used it to explain things to different people as was the case with the man that doubted the complexion of his son. The Prophet responded by an analogy with the example of a camel.[21]

In addition, the companions did use *qiyās* and the Prophet even approved of the analogy that was correct.
ʿAmmār ibn Yāsir rolled in soil and made the dry ablution (*Tayammum*) and then performed *Śalāt*, when on a journey and he awoke in a state of impurity. His traveling companion, ʿUmar did not do this. They informed the Prophet about their respective actions who did not approve of Ammār covering his entire body in soil because of the verse in Sūrah Al-Mā'idah. He directed him to the correct method and further informed that the dry ablution would be acceptable for greater and lesser impurities.[22]

The Prophet Muħammad himself used *qiyās*, although this is referred to by some scholars as the *Ijtihād* of the Prophet.
The following are examples that will confirm this:
The place where he chose to settle and camp at, at the time of the Battle of Badr. He was asked by a companion, Khabbāb ibn Al-Mundhir if this decision was due to revelation or by choice. He (the Prophet) replied: "By choice…[23]

Another example is the Prophet's reply to the woman who said: "O Messenger of Allah, my mother died and she has outstanding fast as a result of an oath she took. Shall I fast on her behalf?" He replied: "If your mother had outstanding debts and you settled it on her behalf. Would this be accepted? She replied: Yes. He replied: "Then the debt due to Allah is more worthy of being settled."[24]

By applying this kind of analogy, the Prophet taught his companions in particular and the *Ummāh* in general how to use it, thus showing us how to deal with new issues at every time and age. Thus he mentioned that for that person who applies himself and makes a mistake is one reward, while for the person that is correct there are two rewards.[25]

Over and above the four primary sources, some secondary additional sources were also utilized by the Prophet. The Sharīʿah and teaching of previous nations were considered at times, only if it was approved by the Prophet or by someone who was reliable and trustworthy like ʿAbd Allah ibn Sallām. Such practices were considered as long as there was no evidence of abrogation or *takhśīś*. The Qur'ān warned about some of the previous scriptures that have been adulterated, "Then woe to those who write the Book with their own hands and then say, "This is from Allah…"[26]
The Qur'ān further encourages us to follow the pure and pristine teachings of the Ibrāhīm for example. Allah says in Sūrah Al-Nahl, verse: 123 "Then, we have sent the revelation to you (O Muħammad saying): follow the religion of Ibrāhīm of Islamic monotheism."

When the Prophet arrived in Madīnah, he found the Jews fasting on the Day of ʿAshūrāh. He inquired about that. They said: "It is the day on which Allah saved the Prophet Mūsā. The Prophet said: "We have a greater right and affinity to Mūsā then them, so he fasted and he ordered the people to fast on that day.[27]

We also found examples of *Sadd Al-Dharā'i΄* (blocking the ways) and *Al-Barā'at Al-Aśliyah* (the principle of the presumption of continuity) in the Prophets time. An example of the first is when a group of companions refused to eat from what was hunted by Abū Qatādāh until the Messenger of Allah permitted them. They held on to the apparent understanding of the verse "O you who believe! Kill not the game while you are in a state of *Iħrām* (for Ħajj or ʿUmrāh)…"[28]

As for the second, the companion, Abū ʿUbaydah ibn Al-Jarrāħ and his decision to consume the whale that had been washed to the shore without slaughtering it. He held on to the initial principle that implies that something is permissible until proven otherwise.[29]

The legal rulings prior to the *Hijrāh* were relatively few, they included laws on the prohibition of burying the daughters etc.

The following is a historical account of some of the many rulings that occurred before and after the *Hijrāh*:[30]

1. *Śalāt*: in the early days of prophethood, the Prophet performed two *rakāts* in the morning and two in the evening. Thereafter, the five daily prayers were made obligatory on the occasion of the ascension to the heavens which took place a year prior to the *Hijrāh*.
2. Ablution, bathing and keeping ones body clean from all impurities was something that was made incumbent on the Prophet and his followers while he was in Makkah. The verse "None but the purified can touch it." Likewise when ʿUmar ibn Al-Khaŧŧāb accepted Islam, his sister prevented him from touching the pages of the Qur'ān until he had taken a bath.
3. The *Adhān* (call to prayer) was instituted in the first year after *Hijrāh* after the companions had contributed with different suggestions. ʿAbd Allah ibn Zayd saw a dream, wherein he was taught the words of the call and the *Iqāmah*. ʿUmar had a similar dream. The Prophet subsequently instructed Bilāl to call the people to prayer with the very same words.[31]
4. The laws of marriage that included the payment of dowry and the post wedding function were all taught by the Prophet in the first year of *Hijrāh*. The Prophet told ʿAbd Al-Raħmān ibn ʿAwf after he married, "Have a feast (*walīmāh)* even if it be by slaughtering a single sheep."[32]
5. The various verses pertaining to *Jihād* and striving in the path of Allah were revealed in Madīnah. The first was the injuction that instructed Muslims to fight in order to protect their religion and themselves. This

was established by verse: 39 in Sūrah Al-Ħajj "Permission to fight is given to those who are fought against, because they have been wronged"

6. Fasting was instituted in the second year after *Hijrāh*, first with the fast on the day of *ʿAshūrāh* and then with the obligatory fasts in the month of Ramađān. Sūrah Al-Baqarah, verse: 183 "O you who believe! Fasting has been prescribed on you as it was on those before you so that you may acquire Allah consciousness".
7. The *Śalāt* on the days of the two *ʿĪds* was also introduced in the second year. The companion, Anas said that when the Prophet arrived in Madīnah, he found that the people had two days of rejoicing and enjoyment. He said: "Allah has granted you in place of these two something better, the day of *ʿĪd Al-Fitr* and *Al-Ađħā"* 33
8. The compulsion to pay *Zakāt* was initiated in the second year before the month of *Ramađān*.34
9. The direction of the *Qiblāh*(direction which is faced while in *Śalāt*) was changed from Masjid Al-Aqśā to the Kaʿbāh in Makkah. This occurred in the second year.35
10. In the 3rd year after *Hijrāh*, after the Battle of Uħud, the verses pertaining to the laws of inheritance were revealed. It is reported from Jābir that a woman (wife of Saʿd ibn Rabīʿ) came to the Prophet and said, "these are two daughters of Saʿd. Their father was killed in Uħud and their paternal uncle has taken their wealth." He replied: "Allah will judge in this matter." As a result, verses 11-12 of Sūrah Al-Nisā were revealed.36
11. The laws pertaining to divorce and the waiting period after divorce or the death of the husband were revealed in the 3rd year. These laws are contained in Sūrah Ŧalāq and numerous Aħādīth.
12. *Śalāt* at the time of fear (*Khawf*) and the shortening of *Śalāt* while travelling were introduced in the 4th year in the Battle of *Dhāt Al-Riqāʿ* along with the revelation of verse 100-101 of Sūrah Al-Nisā37
13. Stoning as a punishment for adultery was legislated in the 4th year.38

14. The laws related to *Ħajj* and *ʿUmrāh* and their obligatory nature appeared in verse: 97 of Sūrah Al-ʿImrān "And *Ħajj* (pilgrimage to the House of Allah) is a duty that mankind owes to Allah, those who can afford the expenses." These practices were known by the Arabs as they were practices of the Prophet Ibrāhīm.
15. In the 5th year the law related to *Ilā* (when a man takes an oath that he will not approach his wife) were revealed.[39]
16. The impermissibility of alcohol, gambling and other such vices took place in the 6th year after a gradual process that was preceded with three verses.[40]
17. The flesh of donkey was declared unlawful in the 7th year in the Battle of Khaybar.[41]
18. In the 8th year Allah favoured the Prophet and assisted him in the conquest of Makkah. On this occasion he proclaimed the sanctity of Makkah and its precincts.[42]
19. Some of the criminal laws were introduced in the 8th year. The Prophet had the hand of the Makhzūmī woman cut in conformity with the verse.[43]
20. In the 9th year, the laws pertaining to *Liʿān* (when the husband accuses his wife of being unfaithful) were revealed. This was in response to the incident by ʿUwaymir Al-ʿAjlānī who accused his wife of adultery. With the result Allah revealed verse: 6-9 in Sūrah Al-Nūr[44]
21. In the 10th year, Muslims were taught how to perform *Śalāt* at the time of the eclipse of the sun. This was on the occasion of the death of the Prophet's son Ibrāhīm.[45]
22. The famous farewell sermon delivered by the Prophet on the occasion of *Ħajj* contained many important teachings including the sacred nature of a persons life and the impermissibility of a making a bequest to a heir.[46]
23. The verses forbidding interest and usury and other issues related to trade and business were revealed in the 10th year.[47]
24. One of the last injunctions revealed was the ruling concerning those that leave neither ascendants or descendents as heirs (*kalālah).*[48]

25. Finally, while on the plains of ʿ*Arafāt*, the following verse was revealed "This day I have completed for you your religion and I have completed my favour on you and I have chosen Islam for you as your religion (way of life)." This verse signified the completion of the principles and legal part of Islam, while the last verse revealed was "And be afraid of the day when you shall be brought back to Allah." This verse according to Ibn ʿAbbās and others was revealed about nine days prior to the Prophet's demise.[49]

From the examples, it is evident that *Ijtihād* occurred during the Prophet's time and was even used by the companions. The Prophet approved of that which conformed to the principles of the Sharīʿah as he did with the well known Ħadīth of Muāʿdh. He also dissociated himself or voiced his displeasure at any incorrect judgement pronounced by any of his companions as with Khālid ibn Walīd as reported by *Al-Bukhārī*.[50]

It is also evident that the principles that govern Islamic Jurisprudence (*Fiqh*) were established and completed in the Prophet's time, but these were not formerly documented. However, new issues and derivatives continued to appear and change from time to time and from place to place. Thus from the life of the Prophet and his companions we derive general principles that are the foundation on which *Uśūl-Fiqh* as a subject was later based and their rulings also serve as a precedent for us in our rulings. He trained his companions and we are thus required to train our scholars and source our methodology and rulings from the methodology formulated by and approved by the Prophet.

As we have already mentioned that the Prophet Muħammad resolved all conflict, but he also trained some of his companions to carry out this responsibility on different levels. He approved of some companions and allowed them to serve as Judges (*Qādi's*), while some served as Jurisconsult (*Muftīs*).

Imām Al-Ŧabarānī reports from Masrūq who said that the people responsible for judgement (*qađā*) during the Prophets time were six people namely; ʿUmar, ʿAlī, ʿAbd Allah ibn Masʿūd, Ubay ibn Kaʿb, Zayd ibn Thābit and Abū Mūsā Al-ʿAshʿarī.[51]

It is reported by Imām Aħmad, Abū Dāwūd and Ibn Mājah that the Prophet sent Maʿqil ibn Yasār as a Judge to Yemen. Maʿqil was at the time a young man, and the Prophet invoked Allah to guide him and to keep his tongue firm. With the result Maʿqil said that he never doubted when judging between tow people.[52]

It is reported by Imām Aħmad and Al-Dāraquŧnī that on one occasion two disputants came to the Prophet. The Prophet instructed ʿUqbāh ibn ʿAmir to stand and judge between them. ʿUqbāh was not keen and felt that the Prophet was best suited for this task. The Prophet repeated his instruction. After observing ʿUqbāh's hesitation, the Prophet told him, "Apply yourself, if you are correct, then you will receive ten rewards and if you ere than for you is a single reward.[52]

The companions were all not eager to take on this responsibility of passing judgement as is evident from the above narration. Another example of this is when ʿUthmān said to Ibn ʿUmar: "Judge between the people because your father used to do so." Ibn ʿUmar replied, "My father used to rule and judge and if something was not clear he asked the Prophet and if the Prophet was unsure, he asked Jibrīl. I don't have anyone to ask and I am not like my father."[53]

The Prophet Muħammad also trained some of his companions in the process of pronouncing *fatwā* as it was an essential part of the community. The nature and role of the jurisconsult (*Muftī)* is different from that of judge (*Qādī).*
Without doubt, the greatest *Muftī* was the Prophet himself and many scholars have written books wherein they compiled his legal rulings and verdicts (*fatāwā*).

It is without doubt that the companions witnessed revelation and accompanied him during his battles and at various other occasions, thus they observed his practices and were well acquainted with his verdicts in different circumstances.

They were those that were distinguished and were granted the responsibility of issuing verdicts. There were about 14 *Muftī's* who pronounced verdicts in the Prophets presence.54 They will be mentioned first and then followed with some others.

1. Abū Bakr. The 1st rightly guided *Khalīf*.
2. ʿUmar ibn Al-Khaŧŧāb. The 2nd of the rightly guided *Khalīfs*. A number of verses of the Qur'ān were revealed as per his suggestion. He also made many notable contributions to the state as *Khalīf*. He was the 1st Judge after the Prophet as he was appointed by Abū Bakr.
3. ʿUthmān ibn ʿAffān. The 3rd *Khalīf*. He was regarded as one of the most knowledgeable in matters of *Ħajj* and *ʿUmrāh*.
4. ʿAlī ibn Abī Ŧālib. The 4th *Khalīf*. He was the first Judge appointed by the Prophet and he was sent to Yemen. He was very knowledgeable in matters of the Sunnah.
5. ʿAbd Al-Raħmān ibn ʿAwf. One of the ten promised Jannah.
6. ʿAbd Allah ibn Masʿūd. He is the one who the Prophet encouraged us to take the Qur'ān from.
7. Zayd ibn Thābit. One of the scribes of the Qur'ān and the one appointed by Abū Bakr to compile the Qur'ān. He was very knowledgeable in matters of inheritance.
8. Muāʿdh ibn Jabal. He was knowledgeable in what was related to the lawful and unlawful in Islam. We were also encouraged to take the Qur'ān from him.
9. Ubay ibn Kaʿb. He was an excellent reciter by testimony from the Prophet. He was consulted by the companions who were very pleased with his verdicts.
10. Abū Mūsā Al-Ashʿarī. The Prophet appointed him to some areas of Yemen and he also taught the people of Baśrāh.

11. Abū Dardā ʿUwaymir ibn ʿAāmir. He was a jurist and devout worshipper. Muāʿdh advised people to seek knowledge from him. He was a Judge in Damascus in ʿUmar's time.
12. ʿUbādāh ibn Śāmit. He was one of the first Judges and teachers sent by ʿUmar to Syria. He was the first Judge in Palestine.
13. ʿAmmār ibn Yāsir. A person who the Prophet referred to as one filled with *Imān*.
14. Hudhayfāh ibn Al-Yamān. Very knowledgeable about calamities and the different afflictions to face the Muslims.
15. Abu Dhar Al-Ghifārī
16. Salmān Al-Fārsī
17. Abū ʿUbaydāh ibn Al-Jarrāħ
18. Muśʿab ibn ʿUmayr
19. Sālim ibn Maʿqil
20. Saʿd ibn Muāʿdh
21. ʿUthmān ibn Mazhʿūn
22. Jaʿfar ibn Abī Ŧālib
23. Zayd ibn Ħārithāh
24. Khālid ibn Saʿīd ibn Al-ʿAās
25. Khubayb ibn ʿAdī
26. ʿAbd Allah ibn Jaħsh
27. Ħamzā ibn ʿAbd Al- Muŧŧalib
28. Fāŧimāh, the Prophet's daughter
29. Khuzaymāh ibn Thābit
30. Khālid ibn Walīd
31. ʿAbd Allah ibn Rawāħāh
32. Usāmāh ibn Zayd
33. Abū Saʿīd Al-Khuđrī
34. ʿAmr ibn Al-ʿAās
35. Abū Qatādāh Al-Ħārith ibn Ribʿī
36. Qatādāh ibn Nuʿmān

37. Umm Salamāh, wife of the Prophet
38. Zaynab bint Jaħsh, wife of the Prophet

Notes for Chapter Two

1. Al-Bukhārī, *Al-Śaħīħ, Kitāb Al-Śalāt,* Ħadīth no. 228.
2. Al-Suyūŧī, Jālal Al-Dīn, *Al-Itqān f ī Ulūm Al-Qur'ān*, Beirut, Al-Maktabah Al-ʿAśriyah, vol.1, p. 16 also Schacht, J, *Origins of Moħammadan Jurisprudence,* Oxford, 1950, p. 120-130
3. Al-Qurŧubī, *Al-Jāmiʿ li Aħkām Al-Qur'ān*, vol.1, p. 102 , Beirut, Dār Al-Fikr
4. Al-Suyūŧī, *Al-Itqān*, vol.1, p.43 also Al-Qaŧŧān, Mannāʿ, *Mabāhith fi Ulūm Al-Qur'ān*, p.52
5. Ibid, p.67
6. ʿAbd Al-Khāliq, ʿAbd Al-Ghanī, *Ħujjiyat Al-Sunnah*, Cairo, Dār Al-Wafā p. 76 also Al-Suyūŧī, *Tadrīb Al-Rāwī*, Beirut, Dār Al-Kitāb Al-ʿArabī, vol.1, p. 34
7. Sūrah Al-Najm, verse: 3 also Sūrah Al-Nahl, verse: 44
8. Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Śalāt*, Ħadīth no. 426
9. Sūrah Al-Maʿārij, verse: 25
10. Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Zakāt*, Ħadīth no. 708.
11. Ibid, Ħadīth no. 755
12. Zuħaylī, Wahbah, *Al-Fiqh Al-Islāmī* also Jumuā, Alī, *Al-Makāyīl wa Al-Mawāzīn*, p.
13. Sūrah Al-Ħashr, veres: 7
14. Ibn Kathīr, *Tafsīr Al-Qur'ān Al-Azīim*, Beirut, Dār Al-Fikr, vol.1, p. 88
15. Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-'Ilm and Kitāb Al-Ađaħī*, Ħadīth no. 111 & 1870.
16. Al-Ħajwī, Muħammad ibn Al-Ħasan, *Al-Fikr Al-Sāmī*, Madīnah, Al-Maktabat Al-ʿIlmiyah, vol.1, p.57
17. Hitū, Ħasan, *Al-Wajīiz fī Uśūl Al-Tashrīʿ Al-Islāmī*, Beirut, Muassasa Al-Risālah, p.241 also Al-Zarkashī, *Al-Baħr Al-Muħīt*, Kuwait, Wizārat Al-Awqāf, vol.2, p.98
18. Ibid, p.353 and vol.3
19. Al-Tirmidhī, *Sunan,* Chapter on Trials and Tribulations, Ħadīth no. 2166, 2167, Riyadh, Dār Al-Salām Publishers
20. Al-Ghazālī, Abū Ħāmid, *Al-Mustaśfā*, Beirut, Dār Al-Fikr, vol. 2, p. 124
21. Al-Bukhārī*, Al-Śaħīħ*, *Kitāb Al-Li'ān*, Ħadīth no. 3766 from Abū Hurayrāh.
22. Ibid, *Kitāb Al-Tayammum,* Ħadīth no. 338 & 344 and *Kitāb Al-Ŧibb*, Ħadīth no. 5736 & 5742
23. Aħmad, Mahdī Rizq Allāh, *Al-Sīrah Al-Nabawiyah fi Dow Maśādirihā Al-Aśliyah*, Riyadh, Muassasah Malik Fayśal, p. 142
24. Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Śawm,* Ħadīth no. 1953 and *Śaħīħ Muslim*, *Kitâb Al-Sawm*, Ħadīth no. 2693.
25. Al-Tirmidhī, *Sunan*, *Kitāb Al-Ahkām*, Ħadīth no. 1326 and Ibn Mājah, *Sunan*, *Al-Ahkām*, Ħadīth no. 2314 from ʿAmr ibn Al-ʿAas
26. Sūrah Al-Baqarah, verse: 79

27. Al-Bukhārī*,* *Al-Śaħīħ*, *Kitāb Al-Sawm*, Ħadīth no. 2004 also *Śaħīħ Muslim,* Ħadīth no. 2656 & 2658
28. Sūrah Al-Māidah, verse: 95 also Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Śayd*, Ħadīth. No. 1821.
29. Ibid, *Kitāb Al-Śayd*, Ħadīth no. 5493 & 5494 and Abū Dāwūd, *Sunan*, Chapter of Foods. Ħadīth no. 3840, Riyadh, Dār Al-Salām Publishers
30. Al-Ħajwī, Muħammad ibn Al-Ħasan, *Al-Fikr Al-Sāmī,* vol.1,p.108, also Al-Dehlawī, Shāh Walī Allah, *Ħujjatullahi Al-Bāligha*, Beirut, Dār Al-Kutub Al-ʿIlmiyah, also Būtī, Muħammad Saʿīd Ramađān, *Tārikh Al-Tashrī Al-Islāmī* (audio).
31. Al-Tirmidhī, *Sunan*, The Call to *Śalāt*, Ħadīth no. 498 also Abū Dāwūd, *Sunan*, Book on *Śalāt*, Ħadīth no. 1801
32. Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Nikāh,* Ħadīth no. 5167
33. Al-Tirmidhī, *Sunan*, Chapter on Fasting, Ħadīth no. 802 ,Abū Dāwūd, *Sunan*, Chapter on the ʿIīd Śalāt, Ħadīth no. 1134
34. Al-ʿAsqalānī, Ibn Ħajr, *Fatħ Al-Bārī*, *Kitāb Al-Zakāt*, Ħadīth no. 1395, Cairo, Dār Al-Rayyān also *Śaħīħ Muslim*
35. Sūrah Al-Baqarah, verse: 144
36. Ibn Mājah, *Sunan*, Chapter on Inheritance, Ħadīth no. 2720, Ħadīth of Jābir and Al-Tirmidhī, *Sunan*, Chapter on the Daughters share, Ħadīth no. 2092, Riyadh, Dār Al-Salām Publishers
37. Sūrah Al-Nisā, verse: 100-101, also Aħmad, Mahdī Rizq Allāh, *Al-Sīrah Al-Nabawiyah*, p. 424 Al-Shawkānī, *Nayl Al-Awtār*, Beirut, Dār Al-Kitāb Al-ʿArabī, vol.2, p. 622
38. Al-ʿAsqalānī, Ibn Ħajr, *Fatħ Al-Bārī*, Chapter on Punishments, Ħadīth no. 4418 from Ibn ʿAbbās, and *Śaħīħ Muslim* from Abū Hurayrāh, Ħadīth no. 4420, Riyadh, Dār Al-Salām Publishers
39. Sūrah Al-Baqarah, verse: 226, also Al-Qurtubī, *Al-Jāmiʾ li Aħkām Al-Qur'ān*, Beirut, vol.2, p. 429 , Beirut, Dār Al-Fikr and Al-Bukhārī, *Al-Śaħīħ*, Book on Divorce, Chapter 38,
40. Al-ʿAsqalānī, Ibn Ħajr, *Fatħ Al-Bārī, Kitāb Al-Ashribah*, Ħadīth no. 5580 & 5581
41. Būtī, Muħammad Saʿīd Ramađān, *Fiqh Al-Sīrah*, Beirut, Dār Al-Fikr, p.337, also Al-Bukhārī, *Al-Śaħīħ*, Ħadīth no. 5523, also Aħmad, Mahdī Rizq Allah, Al *-Sīrah Al-Nabawiyah fī Dow Maśādirihā Al-Aśliyah*, p.510
42. Al-Nawawī, *Śaħīħ Muslim* and commentary, *Kitāb Al-Ħajj*, Ħadīth no. 3302 from Ibn ʿAbbās, Beirut, Dār Al-Fikr
43. Al-Qurtubī, *Al-Jāmi' Li Aħkām Al-Qur'ān*, Beirut, Dār Al-Kitāb Al-ʿArabī vol.4, p.351 and Al-Bukhārī, *Al-Śaħīħ*, Chapter on Punishment, Ħadīth no. 6788
44. Al-Bukhārī, *Al-Śaħīħ*, Chapter on Divorce, Ħadith no. 5311
45. Al-ʿAsqalānī, Ibn Ħajr, *Fatħ Al-Bārī*, *Śalāt Al-Kusūf*, Ħadīth no. 1025, also Al-Shawkānī, *Nayl Al-Awtār*, vol.2, p. 632
46. Al-Tirmidhī, *Sunan*, *Kitāb Al-Waśāyā*, Ħadīth no. 2120 from Abū Umāmāh Al-Bāhilī

47. Al-ʿAsqalānī, Ibn Ħajr, *Fatħ Al-Bārī*, *Kitāb Al-Ribā*, Ħadīth no. 2084
48. Sūrah Al-Nisā, verse: 178
49. Sūrah Al-Māidah, verse: 2 and Sūrah Al-Baqarah, verse: 281
50. Ħadīth of Muāʿdh, Al-Tirmidhī, *Sunan, Kitāb Al-Ahkām*, Ħadīth no. 1327 and Ħadīth Khālid, Al-Bukhārī, *Al-Śaħīħ*, *Kitāb Al-Ahkām*, Ħadīth no. 7189 from Ibn ʿUmar
51. Al-Haytamī, Ibn Ħajr, *Majma' Al-Zawā'id*, Beirut, vol. 9, p.313
52. Ibn Ħanbal, Aħmad, *Musnad*, Beirut, vol.1,p. 88 also Abū Dāwūd, *Sunan*, Beirut, vol.3, p.310, also Ibn Mājah, *Sunan*, Ħadīth no. 2310 & 2343
53. Al-Tirmidhī, *Sunan*, *Kitāb Al-Aħkām*, Ħadīth no. 1322
54. Al-Ħajwī, Muħammad ibn Al-Ħasan, *Al-Fikr Al-Sāmī*, vol.1.p. 167 also Ibn Kathīr, *Al-Bidāyah wa Al-Nihāyah*, Egypt, Dār Al-Rayyān also Al-ʿAsqalānī, Ibn Ħajr, *Al-Iśābah fi Tamyīz Al-Śaħābah*, Beirut, Dār Iħyā Al-Turāth Al-ʿArabī, also Al-Jawziyāh, Ibn Qayyim, *I'lām Al-Muwaqqi'īn*, vol .2, p. 231, Beirut, Dār Al-Kitāb Al-ʿArabī,
55. Ibid. also Al-Dhahabī, *Siyar A'lām Al-Nubalā*, vol. 2 and 3, Beirut, Dār Al-Fikr

Chapter Three
The Second Stage in the development of Islamic Jurisprudence
(From the death of the Prophet Muħammad until the end of the second century)

During the Prophet's time, the foundations and principles of jurisprudence were established. Thus the duty of later scholars was to utilize these and deduce rulings on new issues.
This period witnessed the spread of Islam beyond the Arabian Peninsula and with the result the Muslims interacted with various other non-Arab communities, which subsequently resulted in more 'new' issues that required Sharʿī rulings and verdicts. The jurists and jurisconsults (*Muftī's*) were required to apply themselves in resolving these matters. This period was one of great academic progress. *Fiqh* maxims were written and many were engaged in reporting and transmitting Ħadīth and interpreting the Qur'ān.
Despite the nature of this period, the legal scholars and jurists ultimate goal still was to deduce laws from the Qur'ān and Sunnah that conformed to the spirit and objectives of the Sharīʿah. Due to the different approaches and methodologies of different legal scholars, different schools developed. However, we are able to say that during this period, Islamic Jurisprudence matured and developed fully.[1]

The period after the Prophet may be divided into two phases. The first being that of the rightly guided *Khalīfs'* that lasted for about thirty years. It commenced with Abū Bakr and terminated when Ħasan ibn ʿAlī relinquished his position to Muʿāwiyā.
The second phase commenced with Muʿāwiyā and the ensuing rule of the Banī Umayyāh until the end of the first hundred years.

After the death of the Prophet Muħammad, his companions pledged their support to the first *Khalīf*, Abū Bakr who ruled for two years and three months. He was followed by ʿUmar ibn Al-Khaŧŧāb who ruled for ten years and six months and was succeeded by ʿUthmān, who ruled for twelve years. He was followed by ʿAlī ibn Abī Ŧālib who ruled for four years and nine months. ʿAlī was succeeded by his son, Ħasan who ruled for about six months until he handed over the reigns of power to Muʿāwiyā, thus concluding the period known as the *Khilāfah* on the Prophetic model that lasted for thirty years as predicted by the Prophet.[2]

It is worthy to note that during the latter period of ʿUthmān's era, there was a group of rebels that revolted against him under the leadership of ʿAbd Allah ibn Sabā, a Yemeni Jew. This group was eventually responsible for murdering ʿUthmān. Initially their grievances were political in nature and later they became known as the Shīʿah with their own jurisprudence.
After ʿUthmān's martyrdom and the ensuing differences amongst the companions over the cause of action pertaining to the perpetrators of the crime, a group known as the Khawārij emerged who also had their own jurisprudence.[3]

3.1 What was the Islamic Jurisprudence like during the period of the Rightly guided *Khalīfs*?

The four *Khalīfs* were all trained in jurisprudence and other matters of Islam by the best teacher, the Prophet Muħammad. They were very capable jurists but at the same time consultation (*shūrā*) formed an essential part of their rule. In addition this period was one that had not yet witnessed many significant changes, with the result the number of new issues that required *Ijtihād* were considerably few.[4]

The practice that involved a single person who discussed various issues while others listened was something that was started during the companion's time. It is reported that Abū Hurayrāh, ʿAbd Allah ibn ʿAbbās and others did this.[5]

The following are some examples of the *Ijtihād* during the period of the *Khalīfs'*:
During Abū Bakr's time:

1. When the companions were unsure as to where they ought to bury the Prophet. Abū Bakr resolved the disagreement by referring to the Sunnah.[6]
2. The inheritance of the grandmother who came enquiring about her share of the inheritance. Abū Bakr was unaware and thus agreed to consult the people. Al-Mughīrah ibn Shuʿbah informed him that the Messenger of Allah granted her one sixth and he was supported by Muħammad ibn Maslamah. Abū Bakr accepted this and gave her the one sixth.[7]

During ʿUmar's time:

1. His decision to gather the people behind a single *Imām* for the *Tarāwīħ Śalāt* with twenty *rak'āts* in the month of *Ramađān*.[8]

ʿUmar made many other excellent contributions in economic matters and issues related to the judiciary. He even wrote to the judges instructing them in various ways.

During ʿUthmān's time:

1. He completed the process of compiling the Qur'ān and thereafter he gathered the people on a single script.
2. He decided to shorten his *Śalāt* during *Ħajj* because he regarded himself as a resident of Makkah. He maintained that shortening the *Śalāt* was related to travelling and not connected to the *Ħajj*..[9]

During ʿAlī's period:

1. ʿUmar intended to stone a mentally ill woman for adultery when she delivered after six months. ʿAlī opposed this and supported his objection with verse 233 of Sūrah Al-Baqarah. He concluded that the shortest time to delivery is six months and he went on to say that Allah had overlooked and pardoned one who is insane.[10]

3.1.1 Other jurists during the period of the *Khalīfs*

During the period of the rightly guided *Khalīfs*, there were a number of companions who were known for their expertise in jurisprudence and pronouncing legal verdicts (*fatwā)*. Some of them were:[11]

1. ʿAishāh (d. 57 A.H). The wife of the Prophet and daughter of Abū Bakr.
2. Ħafsah (d. 41 A.H). The wife of the Prophet and daughter of ʿUmar.
3. Anas ibn Mālik (d. 90 A.H). The last companion to die in Basrah.
4. Abū Hurayrah (d. 59 A.H). The one who narrated the most Ħadīth.
5. ʿAbd Allah ibn ʿAmr ibn Al-ʿAās (d. 65 A.H).
6. Abū Ayyūb Al-Anśārī (d. 52 A.H).
7. Maymūnah, the last of the Prophet's wives.
8. Saʿd ibn Abī Waqāś (d. 55 A.H)
9. Saʿīd ibn Zubayr
10. Al-Zubayr ibn Al-ʿAwwām (d. 36 A.H)
11. Ŧalħā (d. 36 A.H)
12. Jābir ibn ʿAbd Allah (d. 78 A.H). He had a study circle in the Prophet's Mosque.
13. ʿUtbāh ibn Ghazwān (d. 17 A.H)
14. Bilāl ibn Rabāħ (d. 20 A.H)
15. ʿUqbāh ibn ʿAāmir (d. 58 A.H)
16. ʿImrān ibn Ħusayn (d. 52 A.H)
17. Maʿqil ibn Yasār
18. Abū Bakrah, Nufayʿ ibn Al-Ħārith (d. 51 A.H)

3.1.1 Other jurists during the period of the *Khalīfs*:

There were a number of followers of the Prophet's companions (*Tābiʿūn*) who were accomplished scholars of jurisprudence and *fatwā* during the period of the rightly guided *Khalīfs*. Some of them were: [12]

1. Shurayħ ibn Al-Ħarth Al-Kindī (d. 80 A.H), who was appointed by ʿUmar as a Judge to Kūfah.

2. ʿIlqamah ibn Qays Al-Nakhaʿī (d. 61 A.H). He was a famous jurist of Iraq who was trained by ʿAbd Allah ibn Masʿūd.
3. Masrūq ibn Al-Ajdaʿ Al-Hamadānī (d. 63 A.H). He transmitted the verdicts of ʿUmar.
4. Al-Aswad ibn Yazīd ibn Qays Al-Nakhaʿī (d. 74 A.H).
5. Abū Idrīs Al-Khawlānī (d. 80 A.H). He was a senior judge of Syria.
6. ʿAbīdah Al-Silmānī (d. 72 A.H). He acquired his knowledge of jurisprudence from ʿAlī and Ibn Masʿūd.
7. Suwayd ibn Ghafalah (d. 80 A.H). He reported from the four rightly guided *Khalīfs*.
8. ʿAmr ibn Shuraħbīl
9. Zir ibn Ħubaysh (d. 82 A.H). He reported from the last three *Khalīfs*.
10. ʿAbd Al-Malik ibn Marwān (d. 86 A.H).

3.1.2 The following are some of the salient features of Islamic Jurisprudence (*fiqh*) at the time of the *Khalīfs*:

1. As soon as an issue arose, the jurists looked into it and attempted to resolve it. In this way the process of extrapolation (*istinbāt*) expanded.
2. The jurists in this period did not engage in speculating on hypothetical rulings and providing rulings for it before these actually occurred. This was regarded as a futile exercise.
3. The politics of the day followed the developments in jurisprudence and not vice versa. This was mainly due to the fact that they relied greatly on consultation.
4. The laws of jurisprudence formed the basis of the constitution for the society. The jurists enjoyed such authority and freedom that even legal practitioners today don't enjoy.
5. The prevalence of consensus (*ijmāʿ*) was made possible because of the concept of consultation. This does not mean that the jurists did not disagree, they did but their agreements out numbered their disagreements.

As we have mentioned, disagreement among the companions did occur. The reasons for the disagreement between the companions in particular and the scholars in general will be discussed at a later stage. We will suffice with a few examples of their disagreement.[13]

1. A woman's husband passed away without having fixed a dowry for her. ʿAbd Allah ibn Masʿūd ruled that she ought to be given the equivalent dowry of the women of the locality, she also needs to complete the waiting period (*ʿiddat*) and she deserves a share from his estate. ʿAlī, however felt that she should not be given any dowry.[14]
2. Abū Mūsā Al-Ashʿarī was asked about the shares in the estate in a situation where there is a daughter, a son's daughter and a sister. He ruled that the daughter must be given ½ and the sister ½ . He then ordered the questioner to go to Ibn Masʿūd because he was quite confident of his approval. When Ibn Masʿūd heard the ruling, he disapproved and insisted on a ruling based on the Prophet's ruling; ½ for the daughter, one sixth for the son's daughter (completing two-thirds) and the remainder for the sister. There are some reports that confirm Abū Mūsā's retraction of his initial verdict.[15]
3. The difference between Abū Bakr and ʿUmar over those who refused to pay *Zakāt* after the Prophet's demise. Should they be killed or not? ʿUmar held on to the general implication of the Ħadīth. The Ħadīth affirmed the sacredness of a persons life and wealth after they testify to the oness of Allah. Abū Bakr refused to consider those who distinguish between *Śalāt* and *Zakāt*. ʿUmar accepted Abū Bakr's decision which was also proof of how analogical reasoning (*qiyâs*) could limit the scope and implication of a general statement.[16]

3.2 The period of the senior and junior contemporaries of the Prophet's companions (*tabi*ʿīn) after the *Khalīfs* until the end of the first hundred years.

No sooner had Muʿāwiyā passed away, that some disagreement arose. Everyone was not satisfied with his son, Yazīd as their leader. Some people in Madinah including some of the companions opposed him. Some senior companions who participated in the Battle of Badr were even killed by Yazīd. This impacted on the jurisprudence, because the Muslim community found within itself those who were no longer loyal to the Banī Umayyāh. At the same time the Shīʿah used the death of Ħasan to give some momentum to their cause. During the period of the Banī Umayyāh, there were leaders like Ħajjāj ibn Yūsuf Al-Thaqafī who killed a number of scholars, while in the same breadth there were leaders like ʿUmar ibn ʿAbd Al-ʿAzīz who in many ways restored a period like that of the rightly guided *Khalīfs* based on consultation.[17]

Islamic Jurisprudence in Muʿāwiyā's time and shortly after his demise:
As already mentioned jurisprudence and government relied greatly on consultation, but from Muʿāwiyā's time this changed to partisanship and autocracy and this affected government and more especially the jurisprudence. The following incident will illustrate this:
Marwān wrote to Usayd ibn Ħuđayr Al-Anśārī who was a governor in Yamāmah informing him that Muʿāwiyā wrote to him telling him that a man from whom something is stolen has more right to the stolen item whenever he finds it.
Usayd replied saying that the Prophet had decreed that if a person who had purchased the stolen item from the thief is not accused, then the owner of the item has a choice to either take the item with its equivalent value or else he could follow up on the thief. Abū Bakr, ʿUmar and ʿUthmān ruled in the same way.
Marwān sent Usayd's letter to Muʿāwiyā who in turn replied and said that they have no choice in the matter but to rule according to what he had decreed…[18]

Another factor that influenced jurisprudence is the dispersing and relocation of many companions to other parts of the Muslim world. The companions varied in the amount of time they spent with the Prophet. Some may have heard the Prophet discuss something and may have been absent when he completed it. When they moved to other parts, their views moved with them. Thus, we find various narrations amongst the people of Iraq, the people pf Syria and the Arabian Peninsula.

The following are some renowned *Muftīs* from among the companions in this period. Some may have been mentioned but are repeated because they were specialist jurists.[19]

1. ʿAbd Allah ibn ʿAbbās, the Prophet's cousin and the leading authority in Tafsīr and *fatwā* who was blessed with the Prophet's supplication for him. Ibn Ħazm mentioned that he is the companion who pronounced the most *fatwā*. In fact Imām Abū Bakr Muħammad ibn Mūsā ibn Yaʿqūb ibn Khalīfah Al-Ma'mūn (d.342) gathered his verdicts in about twenty volumes. His students are testimony to his brilliance and excellence. Some of his students were; ʿIkrimāh, Saʿīd ibn Jubayr, Mujāhid ibn Jabr, ʿAŧā ibn Rabāħ, Ŧāwūs ibn Kaysān, Saʿīd ibn Al-Musayyib and others.

   ʿAlī ibn Al-Madīnī used to say: "Ibn ʿAbbās, Ibn Masʿūd and Zayd ibn Thābit all had followers in *Fiqh* who used to document their *Fatwā*.[20]

2. ʿAbd Allah ibn ʿUmar ibn Al-Khaŧŧāb. In addition to his many excellent characteristics, he continued to pronounce *fatwā* for about sixty years. He also narrated many *aħādīth* and his students Sālim and Nāfiʿ are well known. From him the school of Madinah developed and this ultimately became an essential part of the school of Imām Mālik as is apparent in the *Muwaŧŧā* and the *Mudawwanah*. He was not one who utilized analogical reasoning in his verdicts, instead he judged on the literal meaning derived from the Ħadīth.

3. Muʿāwiyā ibn Abī Sufyān. Despite being a leader and a scribe of revelation, he was an accomplished jurist as was attested to by Ibn ʿAbbās. ʿIkrimāh is reported to have said to Ibn ʿAbbās that Muʿāwiyā made a single *rakʿat* for *Witr Śalāt*. Ibn ʿAbbās replied: "He is a jurist".[21]

4. ʿAbd Allah ibn Al-Zubayr. He was one of the junior companions and was raised by his aunt, ʿAishāh, the wife of the Prophet. He was one of the *Muftīs'* from among the companions. After the death of Muʿāwiyā, the people of the Arabian Peninsula, Iraq and Egypt swore allegiance to him and accepted him as their leader.

Despite the presence of a number of accomplished *Muftīs'* among the companions, they were not all in the same category. ʿAbd Allah ibn ʿAbbās was the one who pronounced the most *fatwā* and he was followed by ʿUmar, then his son ʿAbd Allah, then ʿAlī, Ibn Masʿūd and Zayd ibn Thābit. In *Al-Iśābah*, ʿAishāh's name is added to this list.[22]

3.3 Were the companions all *Mujtahid's*?

Al-Buśayrī, Al-Haytamī and others maintain that they were all *Mujtahids*. Ibn Khaldūn, Al-Suyūtī and others maintain that some qualified as *Mujtahids* while others did not. Those who didn't, simply followed the *Mujtahid*. Al-Sakhāwī reports from Ibn Al-Madīnī that those companions whose schools in jurisprudence were followed were ʿAbd Allah ibn Masʿūd, Zayd ibn Thābit and ʿAbd Allah ibn ʿAbbās. This view seems to be stronger because verse: 43 of Sūrah Al-Nahl "Ask those who know, if you don't know", was revealed to the Prophet Muħammad while his companions were present. So Allah was addressing them as well with this injunction.

This is further supported by a statement by Masrūq who said that three companions used to forgo their opinions in favour of three others. ʿAbd Allah

abandoned his view in favor of ʿUmar's, Abū Mūsā for ʿAlī's and Zayd for Ubay ibn Kaʿb.

The Muslim Ummah however is unanimous on the integrity and credibility of all the companions of the Prophet.[23]

3.3.1 Famous jurisconsults (*Muftīs')* during the *Tābiʿūn*:[24]

1. Saʿīd ibn Al-Musayyib. He combined knowledge of *Fiqh* and Ħadīth. He narrated from ʿAlī, ʿUthmān, Saʿd ibn Abī Waqās, Abū Hurayrah and the wives of the Prophet. He was very familiar with the verdicts of Abū Bakr, ʿUmar, ʿUthmān and ʿAlī. He was one of the seven eminent jurists of Madīnah whose school forms the basis of the school of Imām Mālik. He passed away in 93 A.H.
2. ʿUbayd Allah ibn ʿAbd Allah ibn ʿUtbah ibn Masʿūd (d.94).
3. ʿUrwāh ibn Al-Zubayr ibn Al-ʿAwwām (d.94).
4. Al-Qāsim ibn Muħammad ibn Abī Bakr (d.106)
5. Abū Bakr ibn ʿAbd Al-Raħmān (d.94)
6. Sulaymān ibn Yasār (d. 100)
7. Khārijah ibn Zayd (d. 100)
8. Sālim ibn ʿAbd Allah ibn ʿUmar ibn Al-Khaŧŧāb (d. 106)
9. Abū Salamah ibn ʿAbd Al-Raħmān ibn ʿAwf (d. 104)
10. Ibrāhīm ibn Yazīd ibn Qays Al-Nakhaʿī (d.96). His school forms an integral part of the school of Imām Abū Ħanīfāh.
11. Abū ʿAmr ʿAāmir ibn Sharaħbīl Al-Shaʿbī (d. 103). He pronounced *fatwā* in the presence of some companions.
12. Abān ibn ʿUthmān ibn ʿAffān (d. 105). He was a leading jurist of Madīnah.
13. Abū Qilābah, ʿAbd Allah ibn Zayd (d.104). He was a leading scholar of *Fiqh* and *fatwā* in Basrah.
14. ʿAlī ibn Al-Ħusayn ibn ʿAlī ibn Abī Ŧālib (d. 92). He was an accomplished jurist.

15. Mujāhid ibn Jabr (d. 103). He was a scholar of Tafsīr, Ħadīth and *Fiqh*. He benefitted immensely from the learning of Ibn ʿAbbās.
16. ʿIkrimah, the freed salve of Ibn ʿAbbās (d. 105). Ibn ʿAbbās permitted him to pronounce *fatwā*.
17. ʿAŧā ibn Abī Rabāħ (d. 114). One of the leading *Muftīs'* of Makkah and a specialist in issues related to *Ħajj* and *ʿUmrah*.
18. Muħammad ibn Sīrīn. He was a leading jurist of Basrah.
19. Qatādah ibn Daʿāmah (d. 117). He was one of the junior *tab'īn* but a senior jurist and scholar of Tafsīr.
20. Makħūl ibn Abī Muslim (d. 113). He was a leading jurist of Syria.
21. ʿUmar ibn ʿAbd Al-ʿAzīz (d. 101). He was the famous *Khalīf* and a leading scholar.
22. ʿAbd Al-Raħmān ibn Rāfiʿ Al-Tanūkhī (d. 113). He was a judge in Africa.
23. Nāfiʿ (d. 120). He was the freed slave of ʿAbd Allah ibn ʿUmar and a renowned jurist of Madīnah.

The above are some of the famous *Mujtahids* and *Muftīs* at the time of the junior companions.

In the previous stage, we observed that the senior companions prevailed over the *tab'īn*, but here the *tabi'ūn* seemed to have prevailed in number and fame.

This era also witnessed the emergence of some sects that included the Khawārij and the Shīʿah and the practice of falsely attributing statements to the Prophet Muħammad.

Muʿāwiyā was able to suppress the activities and the ultimate spread of the Shīʿah and Khawārij, but they continued to plan and plot. Much of their efforts were directed at the Muslim government. They aimed to gain support from those who were defeated by the Muslim armies and included the people of Persia and Rome. Outwardly they seemed to concentrate on religious reformation, but they were using other devious methods. They interpreted the Qur'ān to suit them and they even fabricated Ħadīth.[25]

Al-Mukhtār Al-Thaqafī asked some scholars to fabricate a Ħadīth concerning Ħusayn the son of ʿAlī in lieu of 10 000 dirhams and other luxuries.
Ħammād ibn Zayd said: "The disbelievers fabricated 4000 Ħadīth to corrupt the people's Sharīʿah".[26]
The Shīʿah used this practice of fabricating Ħadīth to promote their ideas. Imām Muslim in his introduction to his *Śaħīħ* mentions some names of people that fabricated as much as 70 000 Ħadīth.[27]

In order to preserve the religion and its teachings, hundreds of scholars stood up to defend the Ħadīth by investigating the nature of the chain of narrators and its intricacies. This resulted in the development of the science known as *Al-Jarħ wa Al-Taʿdīl.*

3.4 The classification of the jurists in two groups namely the Iraqis and the Ħijāzis:[28]

We know that ʿUmar did not permit the companions to leave Madinah while Uthmān permitted them to do so. Ibn Masʿūd settled in Kūfah, Iraq where he disseminated his knowledge as he had learnt from the Prophet. Thus the people of Iraq relied on him and his teachings and some even regarded Iraq to have surpassed other areas in knowledge of the Sunnah. This is not so, because Ibn Qayyim Al-Jawziyāh and others mention that approximately only three hundred companions moved to this region. The capital of the Muslim empire moved to Iraq during ʿAlī ibn Abī Ŧālib's era. Other than Ibn Masʿūd, companions like Saʿd ibn Abī Waqās, ʿAmmār ibn Yāsir, Abū Mūsā Al-Ashʿarī, Anas ibn Mālik, Ħudhayfah, Imrān ibn Ħusayn and others settled in Iraq.

There is no doubt however that the majority of the companions remained in Madinah. These included Abū Bakr, ʿUmar, ʿUthmān, ʿAlī initially, ʿAishāh, Zayd ibn Thābit, Umm Salamāh, Ħafsāh, Ibn ʿUmar, Ŧalħā, Abū Hurayrah, ʿAbd Al-Raħmān ibn ʿAwf and others. In Homs there were about seventy companions, which included many who participated in the battle of Badr. In Egypt, there was

ʿAmr ibn Al-ʿAās, Abū Dhar and Al-Zubayr ibn Al-ʿAwwām. Muʿāwiyā, Muāʿdh and Abū Al-Dardā settled in Damascus.

It is maintained by Imām Mālik and others that after the Battle of Ħunayn, the Prophet left about 12 000 companions in Madīnah of whom 10 000 passed away there, while 2000 dispersed to different parts of the Muslim world. This is one reason why the people of *Ħijāz* preferred their narration of Ħadīth over and above the reports from other parts.[29]

There have been scholars of Madīnah who were very critical of Iraq, its scholars and their approach in jurisprudence. These statements ought to be interpreted to refer exclusively to the deviant groups that existed there that included the Shīʿah and the Khawārij. We have already mentioned and will soon reconfirm that Iraq did produce many illustrious scholars.[30]

It is noteworthy that Iraq and its people had fuelled many conflicts. The Muʿtazilites and Ħajjāj ibn Yūsuf were based there, Ħusayn ibn ʿAlī was martyred there and the Qarāmiŧah originated there. The people also had the reputation of being disloyal to their leaders and regularly complained about them irrespective of the level of piety the leaders displayed.
Therefore, when the capital of the Islamic empire was moved to Iraq, there was a minor crisis because of the absence of reputable scholars initially to promote and propagate the Sunnah. To resolve this, scholars like Rabīʿah ibn ʿAbd Al-Raħmān, Yaħyā ibn Saʿīd and others were brought from Madīnah.
These are some of the factors that influenced the Islamic Jurisprudencs and changed its nature from what it was during the period of the rightly guided *Khalīfs*.

As the two 'camps' developed, there appeared to be some kind of 'conflict' between the People of Ħadīth that was represented by the scholars of Madinah

and the People of Rationality and Reason who were represented by the scholars of Iraq.[31]
Saʿīd ibn Al-Musayyib was at the forefront of the People of Ħadīth and Ibrāhīm Al-Nakhaʿī was at the front of the scholars of Iraq.

In reality, there was no conflict between the two, because the scholars from every camp used Ħadīth and analogical reasoning. Both disapproved of anyone who used baseless reasoning or preferred it over Ħadīth.
Ibn Al-Musayyib and those with him regarded their approach as more sound because they had with them the verdicts of senior companions. He relied greatly on the *Musnad* of Abū Hurayrah and whatever he found that conformed to the practice in Madīnah. This approach resulted in what is known as the practice of the People of Madīnah (*ʿAml Ahl Al-Madīnah*) which later became an essential part of the school of Imām Mālik.

Ibrāhīm Al-Nakhaʿī and those with him regarded ʿAbd Allah ibn Masʿūd's approach in jurisprudence as the soundest because of the statement of the Prophet. "Hold on to the covenant of Umm ʿAbd's son (Ibn Masʿūd)."[32]
Ibrāhīm Al-Nakhaʿī had incorporated the verdicts of ʿAlī during his stay in Kūfah. He also included the verdicts of Abū Mūsā Al-Ashʿarī, Saʿd ibn Abī Waqās and Shurayħ who used to consult ʿUmar and ʿUthmān.

Thus whenever people of a respective area differed, they held on to the view of their Imām – Saʿīd ibn Al-Musayyib in Madīnah and Ibrāhīm Al-Nakhaʿī in Iraq. Their approaches influenced the nature of Islamic Jurisprudence in their respective areas Ibrāhīm regarded the laws of the Sharīʿah as rational and logical and they contained benefit and good (*maśālih*) for the Muslim community. He exhausted his energies in trying to establish these benefits. His approach and methodology is supported by verse 220 and verse 185 of Sūrah Al-Baqarah.[33]
This approach became an essential part of the school of Imām Abū Ħanīfah.

Ibn Al-Musayyib on the other hand applied his energy to the Ħadīth, instead of reasoning, which he only applied when there was no explicit text dealing with the issue at hand.

The following example will illustrate the kind of discussion they had:
It is reported by Imām Mālik in his *Muwattā* from Rabīʿah who said: "I asked Saʿīd ibn Al-Musayyib about the blood money for a woman's finger?" He replied: "Ten camels". I then asked about two fingers. He said: "Twenty camels". I then asked about three? He said: "Thirty" I then said: "What about four (fingers)?" He replied: "Twenty".
I (Rabīʿah) said: "When her wound increases, her blood money decreases. Saʿīd said to him (in amazement): "Are you an Iraqi?"
Rabīʿah replied: "No, instead a scholar trying to make sure or an ignorant person trying to learn".
Saʿīd said: "This is the Sunnah".[34]

The verdict of the people of Hijāz was that the blood money of a woman is exactly like a man's until it reaches one-third of the blood money. This is supported by what is reported from ʿAmr ibn Shuʿayb from his father who reported from his grandfather and is recorded in the Ħadīth compilation by *Al-Nisāī*.
If it is more than that, then it will be half of the man's blood money. Rabīʿah did not fully understand this, therefore he questioned it. This question did not impress Saʿīd, so he asked Rabīʿah if he was an Iraqi, implying that he does wish to rationalize the matter, because the verdict of the Iraqis is that her blood money is half that of the man's at all times. Coincidently, this view is maintained by the Ħanafī and Shāfiʿ schools of jurisprudence as well by Imām Layth, Al-Thawrī and others.[35]

In short, the jurisprudence at this stage was largely preserved by memory. The Qur'ān and some of the Sunnah were recorded.

The Arabic Language also had an impact on the development of jurisprudence. During this period, the Arabic Language came into contact with various other languages and this had a negative impact on *Fiqh*. People were committing more and more serious grammatical mistakes and this subsequently influenced their understanding of the Qur'ān and Sunnah and their ability to deduce laws.
It was during the time of ʿAlī ibn Abī Ŧālib, when the judge of Basrah, Abū Al-Aswad Al-Dowalī (d. 69 A.H) approached him and complained about the deterioration of the Arabic language. It was Abū Al-Aswad who then began to record the foundation and rules of Arabic Grammar.[36]

From then on there were many eminent scholars who provided an exceptional service to the language. Coincidently, all of them are Iraqis. Some of them were:

1. Abū ʿAmr ibn ʿAlā (d. 154). He narrated from Anas ibn Mālik.
2. Al-Khalīl ibn Aħmad Al-Azdī (d. 170).
3. Abū Bashr, ʿAmr ibn ʿUthmān, commonly known as "Sibawayh" (d. 180)
4. Al-Kisā'ī, Abū Al-Ħasan Alī ibn Ħamzā (d. 189)
5. Abū Bakr, ʿAbd Al-Qāhir ibn Abd Al-Raħmān Al-Jurjānī (d. 366). He contributed greatly to the science of rhetoric.
6. Alī ibn ʿEsā Al-Rumānī (d. 384). He is the first to introduce logic in the study of Arabic.

3.5 The second century after *Hijrāh*:[37]

ʿUmar ibn ʿAbd Al-ʿAzīz was a leader who was an embodiment of knowledge and piety who passed away in 101 A.H. He was succeeded by a number of other leaders. By 132 A.H. then the Islamic empire had spread from the borders of India until the borders of France. The Umayyad dynasty had ended in 132 A.H and was followed by the ʿAbbasid empire. Baghdad was the capital of the Islamic Empire and because the lifestyle there was not the simple Arab nomadic lifestyle, instead it was more sophisticated. The atmosphere influenced the nature of

jurisprudence and with the result there were more discussions and debates over the new issues that arose.

Manśūr Al-ʿAbbāsī was responsible for translating a number of Greek books on philosophy and other subjects into Arabic, with the result traces of these principles may have found their way in some books of jurisprudence and were used to explain the wisdom and intent of some laws.
3.4.1 Thus, the jurisprudence in Iraq seemed to move away from its original simple and pure nature to a more complex and complicated one. The jurisprudence of Imām Mālik still maintained its simplicity. As already mentioned, the ʿAbbāsids tried to dominate and control this by bringing some scholars from the Arabian Peninsula to Iraq to promote the Sunnah. This resulted in a certain kind of blend between the school of Iraq and the school of *Hijaz*. This gained momentum when students of Imām Abū Ħanīfah, like Abū Yūsuf and Muħammad ibn Al-Ħasan travelled and studied under Imām Mālik and others. Because of these travels and the return of Rabīʿah ibn ʿAbd Al-Raħmān and others to Madīnah, this 'apparent' conflict was avoided.

Throughout this period, *Fiqh* and Ħadīth were preserved in the hearts of man. There were scholars who had memorized thousands of Ħadīth without ever hesitating and doubting their knowledge. When people became more accustomed to comfort and luxury, people's zeal, eagerness and enthusiasm decreased. Thus ʿUmar ibn ʿAbd Al-ʿAzīz is credited for two praiseworthy instructions. The first was his instruction to the scholars to spread out in the Islamic Empire to teach the masses *Fiqh* and other aspects of the religion. About ten *tab'īn* went to areas in Africa with the sole purpose of educating people. This stimulated growth in *Fiqh* and the jurists.[38]

His second instruction was for them to formally and officially begin documenting the Ħadīth and legal verdicts. The compilation of Ħadīth, which in essence is an important source of *Fiqh* thus contributed greatly to the development of *Fiqh*.

The first person to formally write down and document Ħadīth was Muħammad ibn Muslim ibn Shihāb Al-Zuhrī (d. 124 A.H) who was one of the junior *Tābiʽūn* and is supposed to have met about ten companions. He was an accomplished scholar and *Muftī*. He even participated in the political affairs of the state with ʿAbd Al-Malik ibn Marwān. His verdicts were gathered by Muħammad ibn Nūħ in about three volumes.

Another person was Abū Bakr Muħammad ibn ʿAmr ibn Ħazm (d. 120 A.H) who was a renowned jurist and scholar of Madinah who narrated from ʿUmar and Ibn ʿAbbās.

Thereafter Imām Mālik compiled his *Muwattā* that contained the Ħadīth reported by the people of the Arabian Peninsula along with verdicts and views of some of the companions and the *Tābiʽūn*. The book is arranged according to the practical aspects in jurisprudence. This is the first compilation of its kind in Islam. Imām Mālik spent about forty years doing it. The *Muwattā* was accepted by all, even one of the leaders intended to hang it on the Kaʿbah and compel everyone to follow it. Mālik did not permit this, instead he said: "Don't do this, the companions spread out to different parts and narrated Ħadīth other than those reported by the people of Hijāz. People in turn learnt from the companions, so leave them with what they have been doing." (cited by Shāh Walī Allah in *Al-Inśāf fī Bayān Asbāb Al-Ikhtilāf*)
Look at Imām Mālik's insight. Imām Mālik did not wish to have his book become a political tool while people out of choice were eager to follow his book. This book was a great contribution to Islamic Jurisprudence and people to this day continue to benefit from it. In fact scholars of all schools of jurisprudence are indebted to the book. The *Muwattā* also contributed greatly to the spread of the school of Imām Mālik.

A number of other scholars wrote during Mālik's time. Some of them were:
1. ʿAbd Al-Malik ibn Jurayħ in Makkah.

2. ʿAbd Al-Raħmān ibn ʿAmr in Syria.
3. Sufyān Al-Thawrī in Kūfah.
4. Ħammād ibn Salamah in Basrah.
5. Hushaym ibn Bashīr in Wāsiŧ.
6. Maʿmar ibn Rāshid in Yemen.
7. ʿAbd Allah ibn Al-Mubārak in Khurasan.
8. Jarīr ibn ʿAbd Al-Ħamīd in Ray.

Another book of note is *Fiqh Al-Akbar* attributed to Imām Abū Ħanīfah. Although Imām Abū Ħanīfah was born before Imām Mālik, this book was not mentioned first because there is some debate over the attribution of the book to Abū Ħanīfah. However, some scholars maintain that it contains about 60 000 issues and verdicts and was compiled by his students.[39]

In this era there were a number of schools of *Fiqh* that were attributed to eminent and erudite scholars who had reached the level of *Ijtihād*.

3.5.1 The *Mujtahids* in this era are:[40]

1. Abū Saʿīd, Al-Ħasan Al-Baśrī.
2. Abū Ħanīfah, Al-Nuʿmān ibn Thābit. He was born in 80 A.H and witnessed the era of at least four companions. He passed away in 150 A.H after the beating inflicted on him by Manśūr Al-ʿAbbāsī. He narrated from ʿAŧā ibn Abī Rabāħ, Nāfiʿ, Qatādah and Ħammād ibn Abī Sulaymān. He acquired his knowledge of *Fiqh* from Ħammād who acquired it from Ibrāhīm Al-Nakhaʿī who acquired it from ʿIlqamah and Al-Aswad ibn Yazīd who were students of the companion, Ibn Masʿūd.

   His students are many. The most notable are: the famous judge, Abū Yūsuf, Muħammad ibn Al-Ħasan, Zufr ibn Al-Hudhayl and others.

   There have been some who claimed that Imām Abū Ħanīfah did not possess much knowledge of Ħadīth. This is not so, because how can one

attain prominence in *Fiqh* without Ħadīth? In addition, there are *Masānīd* (plural of *Musnad* which is book wherein the narrations of every companion of the Prophet are gathered separately. The names of the companions are arranged alphabetically) attributed to him which as maintained by some are the narrations of his student, Muħammad ibn Al-Ħasan from him. Other scholars have attributed at least fifteen *Musnads* to Abū Ħanīfah.

Probably one of best testimonies of Abū Ħanīfah's ability as a jurist is the statement by Imām Al-Shāfiʿ who said, "People are indebted to Abū Ħanīfah in *Fiqh*".[41]

Abū Ħanīfah excelled in his usage of analogical reasoning together with his amazing ability to analyze complex issues. He is credited for having introduced the concept of assumptions in *Fiqh*. This meant that he would assume that something would take place. He studied it and issued a legal verdict well before it happened. This process also proved to have a positive effect on the development of jurisprudence.

While many have debated the permissibility of this, the majority regard it as permissible. They support their decision by an authentic Ħadīth reported by Al-Miqdād ibn Al-Aswad who said, "I said: O Messenger of Allah, what if I meet a disbelieving man who fights me and strikes one of my arms with a sword and severs it, then he takes refuge under a tree and declares his Islam. Should I fight him after he has pronounced these words?" The Prophet said, "Don't kill him, if you do then…"[42]

Here the Prophet did not prohibit this kind of assumption, instead he replied to the questioner. However the scholars have stated that it is not advisable to engage in such speculative issues at the expense of other more important matters. Even though this was started by Abū Ħanīfah, scholars in the third century used it most. Their over indulgence in this had a negative impact on Islamic Jurisprudence.

The general principles and methodology of Imām Abū Ħanīfah's school were clarified when he said that he took from the Qur'ān, and if he didn't find anything there, he took from the Sunnah. If he still didn't find anything, he carefully selected from the verdicts of the companions. If he reached the likes of Ibrāhīm Al-Nakhaʿī and Ibn Al-Musayyib, he allowed himself to make *Ijtihād*.[43]

A detailed discussion of the methodology (*usūl*) of the Ħanafī school can be found in many books wherein the Ħanafī scholars have explained these issues. An accomplished *Mujtahid* may find the Ħanafī school the easiest, because of its usage of analogical reasoning and rational explanations. Yet, sometimes they omitted some Ħadīth for what is referred to as *Muʿārid Rājiħ* (something different but stronger). But this is found in every school.

The Ħanafī school had to withstand criticism from some scholars of Ħadīth and some rationalist philosophers (*Mutakallimīn*). The school was also criticized for having used juristic trickery or loopholes (*ħiyal*) to either change a certain ruling as when a person who has wealth, then gives it away before the end of one year to avoid paying *Zakāt*.
Many, including Imām Al-Bukhārī criticized them for this. Shaykh ʿAbd Al- Ghanī Al-Maydānī has replied to these criticisms in a book. Although the Sharīʿah has disapproved of this, there are instances when similar things have been permitted. Allah addressed Prophet Ayyūb in Sūrah Śād, verse: 44 'And take in your hand a bundle of thin grass and strike therewith (your wife) and break not your oath'.
Prophet Ayyūb had taken an oath that he would lash his wife with one hundred strokes. He was instructed by Allah to take one hundred thin pieces of grass or twigs, bundle them and then strike her once. In this way, he did not break his oath.
The trickery that tries to discard certain Islamic injunctions has been prohibited by all.

We can then classify these tricks or loopholes into three types:

1. Those rejected by all. e.g. when a hypocrite who outwardly portrays Islam, but in reality is still Kāfir.
2. Those not rejected as when a believing person verbally utters statements of disbelief to protect his life.
3. What cannot be clearly connected to either of the above two. This is the category about which there is lengthy discussion.

3. Abū ʿAmr, ʿAbd Al-Raħmān ibn ʿUmar Al-Awzāʿī. He was the Imām of Syria. He is reported to have pronounced *fatwā* on about 70 000 issues. He disliked analogical reasoning and narrated from senior *tabʿīn* like ʿAŧā, Ibn Sīrīn and Makħūl. Some prominent *tabʿīn* narrated from him. They included Qatādah, Al-Zuhrī and Yaħyā ibn Abī Kathīr. His school spread initially in Spain (Andalus), thereafter it was overtaken by the school of Imām Mālik.

4. Sufyān ibn Saʿīd Al-Thawrī (75-161) was a renowned Imām in Iraq. He narrated from Al-Aswad ibn Yazīd, Zayd ibn Aslam and others. Senior scholars like Al-Aʿmash, Ibn ʿAjlān, Shuʿbah and Mālik narrated from him. Scholars like Al-Ashjaʿī and Al-Muʿāfā ibn Imrān issued *fatwā* with his verdicts.

5. Abū Al-Ħarth, Layth ibn Saʿd (94-175). He was an outstanding scholar and jurist in Egypt. He narrated from ʿAŧā, Saʿīd ibn Abī Saʿīd Al-Maqbarī, Nāfiʿ, Qatādah, Zuhrī and Mālik. ʿAbd Allah ibn Lahiyyah, Ibn ʿAjlān, ʿAbd Allah ibn Wahb and others narrated from him. Some scholars maintain that he was a more accomplished jurist then Mālik, except that he was not supported by his followers.

   By studying the letter Layth wrote to Mālik, one is able to gage what the senior scholars of this period were like and what degree of respect they had for one another. In his letter, he alluded to a number of his verdicts

that differed with the practice in Madīnah. When he discussed the concept of using the practice of the people of Madīnah, such as combining *Śalāt* on a night of intense rain, or issues relating to *Zakāt*, divorce etc. he praised Imām Mālik and spoke of his lofty position as a scholar.

6. Mālik ibn Anas (93-179). He was a great scholar and is one of the narrators in one of the golden and most authentic chains of narration of Ħadīth. He compiled the famous Ħadīth compilation called the *Muwattā*. ʽAbd Allah ibn Wahb said that he heard someone proclaim in Madīnah, that nobody may pronounce *fatwā* except Mālik and Ibn Abī Dh'ib. He was one of the students of the *tabiʽīn*. He narrated from Abū Al-Zinād, Nāfiʽ, Sālim ibn ʽAbd Allah ibn ʽUmar, Zayd ibn Aslam, Hishām ibn ʽUrwah, Muħammad ibn Al-Munkadir, Zuhrī and others.

Many narrated from him; some have estimated his number of students at 1300 from different parts of the Muslim world. The students that transmitted from him include Ibn Al-Qāsim, Nāfiʽ and ʽAbd Allah ibn Wahb. In addition, some of the *Mujtahids* like Abū Ħanīfah, Sufyān Al-Thawrī, Al-Awzāʽī, Ibn ʽUyaynah, Al-Layth and Al-Shāfiʽ narrated from him.

The school of Imām Mālik is primarily established on the basis and principles set by Saʽīd ibn Al-Musayyib. This school is based on the Qur'ān, the Sunnah, *Ijmāʽ*(the consensus of the leagal scholars in an era on ruling), analogical reasoning, the practice of the people of Madinah, *Istiħsān* (juristic preference- when the apparent ruling contained in an evidence is avoided for a stronger evidence) , *Sadd Al-Dharā'iʽ* (To prevent anything that may lead to something bad) and consideration of prior disagreement.

Because of the complex nature of the principles of this school, the *mujtahids* were relatively fewer in number than those in the Shāfiʽ school. Imām Mālik gave preference to the practice of the people of Madīnah over and above

analogical reasoning and even a one channel narration (*khabr al-wāħid*), because he maintained that their practice was equivalent to a narration from the Prophet. The report of a group is more superior than the report of an individual. He also relied on the statements and verdicts of the companions and on *Maślaħah Mursalah* (public welfare – To consider the interest and welfare of the Muslim community before making a ruling. This interest or welfare is based on the acquisition of benefit or avoiding harm by still preserving the intent of the Sharīʿah).[45]

7. Sufyān ibn ʿUyaynah (107-198) was one of the most senior narrators of Ħadīth and a leading scholar of Makkah. He reported from about seventy *tabiʿīn* and shared many of the same teachers with Mālik. Ibn Wahb said that he had not seen anyone more knowledgeable in the Qur'ān than Ibn ʿUyaynah. He was one of the scholars who wrote and authored some books in Mālik's time.

8. Muħammad ibn Idrīs Al-Shāfiʿī (150-204) was raised in Makkah where he memorized the *Muwaţţā* and then proceeded to Madīnah to present it before Mālik. He was permitted to issue *fatwā* when only fifteen years old. Imām Aħmad ibn Ħanbal, Abū Thawr and others narrated from him.

   He travelled to Iraq where he met Muħammad ibn Al-Ħasan with whom he studied. Between the two there were interesting academic discussions and debates. In this way he acquainted himself with the Ħanafī school. In about 195 A.H he returned to Iraq and dictated his juristic verdicts, which later became known as his "old school". He returned to the Arabian Peninsula in 198 A.H and then again to Iraq and finally he travelled to Egypt where he found Mālik's school to be quite popular due to the efforts of his students; Ibn Wahb, Ibn Al-Qāsim, Ash'hab and ʿAbd Allah ibn Al-Ħakam. Here he reviewed his past verdicts and pronounced what eventually became his 'new school'. His juristic verdicts are gathered in *Al-Umm.*

One of his greatest contributions is his book *Al-Risālah* which is regarded as being the first in the principles of jurisprudence (*Uśūl-fiqh*). This book is an attempt to formerly document the principles that govern and assist in the process of issuing *fatwā* and *ijtihād*. His narrations of Ħadīth are to be found in *Musnad Al-Shāfi'ī* and elsewhere.
Imām Shāfiʿī himself clearly spelled out the basis of his school to be the Qur'ān and Sunnah. If there is nothing in the former, then he resorted to analogical reasoning. He however refused to accept *mursa*l narrations with the exception to the narrations of Saʿīd ibn Al-Musayyib.[46] He accepted *ijmā*ʿ (consensus of the *mujtahids*), but rejected *istiħsān*, public welfare and the practice of the people of Madīnah.

Imām Shāfiʿī in some way found himself in a struggle between Iraq and Ħijāz. He noticed that the Ħanafī school was gaining momentum in Iraq and other parts of the Muslim world. This was supported by the fact that the Chief Judge was Abū Yūsuf, Abû Ħanīfah's student.
At the same time, the school of Mālik continued to grow in Egypt and Ħijāz while in Spain, no person was elected as Judge except with recommendation from Imām Yaħyā Al-Laythī. Likewise there was an ongoing debate between some scholars of Ħadīth and the Ħanafī and Mālikī scholars. The Ħanafīs were accused of abandoning some Ħadīth in favor of analogical reasoning, while the Mālikīs were accused of abandoning some Ħadīth in favor of the practice of the people of Madīnah. He also found that the views of some Ħadīth scholars was gaining more credibility. These scholars were Imām Aħmad, Isħāq ibn Rāhawayh, ʿAlī ibn Al-Madīnī, Yaħyā ibn Maʿīn, ʿAbd Al-Raħmān ibn Mahdī and others.

He tried to tread a middle path between the existing schools and approaches, with the result many gathered around him. In addition, his travels to Iraq, his residence in Makkah and his subsequent move to Egypt were instrumental in spreading his school.[47]

The schools of jurisprudence of these eight legal scholars in this era were documented while the remaining five fall in the next stage and will be discussed then. However, there were some specialist jurists and even possible *mujtahids* other that the above eight in this era. Their schools were not documented and preserved.

3.5.2 Other established judges and *muftis* were:[48]

1. Iyās ibn Muʿāwiyā, (d.125) who was a judge appointed during ʿUmar ibn ʿAbd Al-ʿAzīz's time.
2. ʿAbd Al-Raħmān ibn Al-Qāsim ibn Muħammad ibn Abī Bakr (d.126).
3. Yaħyā ibn Abī Kathīr (d.129).
4. Abū Isħāq, ʿAmr ibn ʿAbd Allah Al-Hamadānī (d.127).
5. Muħammad ibn Al-Munkadir (d.130).
6. Mālik ibn Dinār (d. 131).
7. Ayyūb Al-Sakhtiyān (d.131).
8. ʿAtā ibn Muslim Al-Khurasānī (d. 135).
9. ʿAbd Allah ibn Shubrumah (d.144).
10. Jaʿfar Al-Śādiq ibn Muħammad ibn ʿAlī ibn Ħusayn ibn ʿAlī ibn Abī Ŧālib (d.148).
11. Muħammad ibn ʿAbd Al-Raħmān ibn Abī Laylā (d.148).
12. Sulaymān ibn Mahrān (d.148).
13. Muħammad ibn ʿAbd Al-Raħmān ibn Abī Dh'ib 9d.159).
14. Shuʿbah ibn Al-Ħajjāj (d.160).
15. ʿAbd Al-ʿAzīz ibn ʿAbd Allah ibn Abī Salamah Al-Mājishūn
16. ʿAbd Allah ibn Lahīʿah (d.174).
17. Sharīk ibn ʿAbd Allah Al-Nakhaʿī (d.177).
18. ʿAbd Allah ibn Al-Mubārak (d.181).
19. Al-Fuđayl ibn ʿAyāđ (d.187).
20. Wakīʿ ibn Al-Jarrāħ (d.196).
21. Ħammād ibn Zayd (d.197).
22. Yaħyā ibn Saʿīd Al-Qaŧŧān (d.198).

23. Yazīd ibn Hārūn (d.252).
24. ʿAbd Al-Razzāq Al-Śanʿānī (d.211).

Every one of the legal scholars of jurisprudence, particularly those of the four schools, had students who were instrumental in promoting the respective school of his teacher.

3.5.3 Some of Imām Abū Ħanīfah's students were:49

1. The Chief Judge, Abū Yūsuf Yaʿqūb ibn Ibrāhīm (113-183) who was a renowned scholar of Ħadīth and Jurisprudence and one of the first to write books in this school. He served as a judge under three different leaders, namely; Al-Mahdī, Al-Hādī and Al-Rashīd. He travelled to Madīnah and studied under Imām Mālik and engaged him in some excellent debates. Because of his expertise in Ħadīth, much of the criticism against the Ħanafī school was withdrawn. His book *Al-Kharāj* is well known while some of his *fatwās* may be found in Imām Al-Shāfīʿs *Al-Umm*.
2. Muħammad ibn Al-Ħasan Al-Shaybānī (132-189). He commenced his studies under Abū Ħanīfah and then continued with Abū Yūsuf. He also travelled to Madinah where he studied under Imām Mālik. He has a very famous narration of the *Muwattā*. In Iraq he met and had many memorable discussions with Imām Al-Shāfʿī. His books are of two types: the first are those that are well known and have been regarded as books of *Zhāhir Al-Riwāyah* and comprise of about seven books. The second consists of those books that did not attain that degree of fame and prominence. These books are of a secondary nature. The scholars of the Ħanafī school rely mainly on the first category of books.
3. Zufr ibn Al-Hudhayl (d.158).
4. Al-Ħasan ibn Ziyād Al-Lu'lū'ī (d.204) who authored a number of books in jurisprudence.

3.5.4 Some of the scholars that were responsible for spreading and promoting Imām Mālik's school of jurisprudence were:[50]

1. Abū ʿAbd Allah, ʿAbd Al-Raħmān ibn Al-Qāsim (d.191) who remained in Imām Mālik's company for about twenty years and is said to have differed with Mālik on four issues and is thus one of the most knowledgeable in matters of this school. Some have even classified him an independent *Mujtahid*.
2. ʿAbd Allah ibn Wahb (d.199) who studied under Layth and Imām Mālik. Mālik referred to him as the Jurist of Egypt. He authored a number of books and was even appointed a judge.
3. ʿUthmān ibn Al-Ħakam (d.163) who is regarded as the one responsible for introducing Imām Mālik's school to Egypt.
4. ʿAlī ibn Ziyād (d.183) who reported from Mālik, Layth, Asad ibn Al-Furāt and Suħnūn. He was one of the most accomplished scholars of Tunisia.
5. ʿAbd Allah ibn Nāfiʿ (d.186) who was a *Muftī* in Madinah after Mālik. He remained in Mālik's company for about forty years. He has a commentary to the *Muwattā* that is reported by Yaħyā ibn Yaħyā.
6. Ziyād ibn ʿAbd Al-Raħmān Al-Qurtubī (d.193) who heard the *Muwattā* from Mālik and is the first to introduce it to Spain (Andalus).

Looking back at the jurisprudence in the second century, we find a slight shift in approach. Initially it was real and factual and then it became to a degree speculative. However, we saw the development of the principles of jurisprudence (*uśūl-fiqh)* and also the introduction of philosophy and logic in some of the juristic discussions. We observed the debate that existed over the possibility of consensus (*ijmā*ʿ) after the period of the companions and the acceptability of *mursal* narrations as evidence.

Despite these debates, it did not in anyway have a negative impact on the strength of jurisprudence, instead it paved the way for the next stage, which was characterized by compilation and excessive writing.

This era boasted a majority of expert legal scholars. These scholars were an embodiment of immense knowledge, piety and excellent character which promoted excellent relationships between the scholars of the time despite their differences. Much of the Arab pride was broken when some of the freed slaves attained high academic positions.

Notes for Chapter Three

1. Al-Zarqā Muśtafā, *Al-Fiqh Al-Islāmī wa Madārisuhu*, Damascus, Dār Al-Qalam, 1995, p 60 also Al-Khuđarī Bik, Muħammad, *Tārīkh Al-Tashrī*', Beirut, Dār Al-Kutub Al-ʿIlmiyah, 1988, p.39

2. Al-Suyūtī, *Tārīkh Al-Khulafā*, Beirut, Dār Al-Fikr, p.89

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Chapter Four

The Third Stage: The Period of maturity (The period from 300 – 400 A.H when Islamic Jurisprudence was partly consolidated on the strength from the previous stage)

During this stage, the *Mujtahids* interacted with one another, but *taqlīd* began to dominate. Many scholars were content with the jurisprudence of the one of the four schools and sometimes their statements were even regarded as evidence. This then is the reason for the statement made by some that during this period there were only scholars who were attached to a school and there were no totally independent *Mujtahids* like the ones mentioned earlier.

It is reported from Imām Al-Nawawī in his commentary to *Al-Muhadhdhab* that with the termination of four hundred years it was not possible to find an independent *Mujtahid*.[1]

This seemed to be the general trend, but there were still some accomplished scholars who attempted *Ijtihād*. Some of these scholars were: Abū Al-Qāsim Al-Darakī Al-Shāfiʿī, Aħmad ibn Maysir, Aħmad ibn Muħammad Al-Ŧaħāwī and others.

So in essence *Ijtihād* did not 'die', instead the enthusiasm had somewhat dwindled, the trials and distractions increased and the Muslim World was divided into smaller states and areas. This in some way impacted on the Jurisprudence.

The political climate at the time also somewhat influenced Islamic Jurisprudence. The Banū Al-ʿAbbās were in power with the leader being Al-Mā'mūn ibn Al-Rashīd. He contributed to a positive academic awakening because he encouraged the scholars to translate Greek, Roman and Indian Philosophies into Arabic. However, when these were not monitored then some of these ideas found their way into issues of *ʿAqīdah* (doctrine) and were utilized by the Shīʿah, the

Khawārij and the Muʿtazilites. Because Mā'mūn was against the Shīʿah, he appeared to support the other two.

Some Muʿtazilites began adopting ideas such as the rejection of *Qadr* (predestination) and they pursued the debate on the creation of the Qur'ān. With time, these groups developed their own ideology and their own jurisprudence. Mā'mūn was succeeded by Al-Mutawakkil who suppressed Muʿtazilite thought. Mā'mūn was responsible for building schools, hospitals and other centers of learning. During Mā'mūn's time the Arab spirit began weakening and the Persian bond began gaining momentum. This was the period when the Turks gained control of parts of the Arab Kingdom. This intermingling and interaction influenced the Arabic Language and in turn influenced and affected the nature of Islamic Jurisprudence.

Slowly, the concept of smaller states began growing. We found the Adārisah Empire in Morocco, the Banū Umayyah in Spain (Andalus), Banū Aghlab in Qayrawān, the Ŧāhiriyah Empire in Khurasān, the ʿAlawiyah Empire in Ŧabristān, the Safariyah Empire in Persia and many others. In about 247 A.H the *Khilāfah* really weakened and the Toloniyah Empire was established in Egypt and Syria and the Banū Bawayh Empire in Iraq. Towards the end of the century, the Shīʿah Empire appeared in Africa having control over Morocco, Algeria, Egypt, Syria and parts of the Arabian Peninsula.
They competed for power with the ʿAbbāsids in Iraq and the Umayyads in Spain. Thus by the end of the fourth century the Islamic Empire was divided into three major empires; (1) Banū ʿAbbās in Iraq (2) The Shīʿah in Africa, parts of Ħijāz and Syria. (3) Banū Umayyah in Spain.[2]

As we are aware that travelling was an essential part of the learning process. Scholars travelled to meet one another and they learnt from one another. Now that there existed smaller empires, more conflicts and battles ensued between different empires and with the result travelling to some regions became difficult

and dangerous. This then had a negative effect on the state of Islamic Jurisprudence.

In addition, the leaders of the empires seemed to adopt different schools of jurisprudence. The Fāṭimids (Shīʿah) promoted Shīʿah ideology and they made the Ismāʿīlī thought and jurisprudence the constitution in Egypt. They openly announced their displeasure and hatred for the Banū Umayyah who followed the school of Imām Mālik and the Banū ʿAbbās who followed the schools of Imām Abū Ħanīfah and Imām Shāfiʿī. This kind of political bias influenced the Islamic Jurisprudence.

During the ʿAbbasid era, Al-Fađl ibn Yaħyā Al-Barnāki discovered paper and this stimulated great development and growth for the Islamic Sciences in general and particularly for Jurisprudence. The scholars and jurists now wrote lengthy works that reached as much as one hundred volumes in Jurisprudence, Ħadīth and other subjects.

It is maintained that the Chinese were the first to use paper. This may be true, but they were in some way an isolated society without any contact with the Muslims. Thus the Muslim scholars may be credited for promoting it in their regions.

The previous stage had eight *Mujtahids*.

4.1 The remaining five existed in this era. They were:[3]

9. Isħāq ibn Ibrāhīm Al-Rāhawayh (d.238). He narrated from Ibn ʿUyayynah, Al-Darāwardī, Muʿtamir ibn Sulaymān, Ibn ʿUlayyāh and Aħmad.

Scholars like Al-Bukhārī, Muslim, Abū Dāwūd, Al-Tirmidhī, Al-Nisā'ī and others narrated from him. Ibn Ħajr referred to him as the *Amīr A*l-*Muminīn* in *Fiqh* and Ħadīth. He had some interesting discussions and debates with Imām Al-Shāfiʿī. He is supposed to have dictated about eleven thousand Ħadīth from memory.

10 Abū Thawr, Ibrāhīm ibn Khālid Al-Kalbī Al-Baghdādī (d. 240). He narrated from Ibn ʿUyayynah, Ibn Mahdī, Al-Shāfiʿī and Wakīʿ while Imām Muslim and others

narrated from him. He had a school of jurisprudence and students but they were few in number. His school failed to continue after 300 A.H.

11 Aћmad ibn Ħanbal (d. 241). He was a *Mujtahid* who was known for his expertise in Ħadīth. His book the *Musnad* is evidence of this as it contains about 30 000 Ħadīth. He travelled to Kufah, Basrah, Makkah, Madinah, Syria and Yemen and thus benefited from many illustrious scholars who included Ibn Mahdī, Ibn ʿUyayynah, Al-Qattān and others.

Imam Al-Shāfiʿī said that when he left Baghdad, he had not left behind anyone more knowledgeable in jurisprudence and more pious than Aћmad ibn Ħanbal. Imām Aћmad displayed great levels of piety and trust when he was tortured and imprisoned for about twenty-eight months because he refused to comply with the leader's demands and accept that the Qur'ān is created. He persevered until the leaders had no choice but to release him. This bold stand was a victory for the Ahl Al-Sunnah.

However, this praiseworthy position of Imām Aћmad eventually led some of his followers into uttering some statements concerning the attributes of Allah that are unacceptable. These views were developed and expounded by Ibn Taymiyah and later by Muћammad ibn ʿAbd Al-Wahhāb.

In principle, the school of Imām Aћmad is a lot like the school of Imām Al-Shāfʿī simply because he studied under him. However the basis of his school may be summed up as follows: The Qur'ān and Ħadīth *Marfūʿ* (statements, actions, approvals and descriptions attributed to the Prophet) and the verdicts of the companions of the Prophet Muћammad. If he found any disagreement among the companions, he chose the view that was closest to the Qur'ān and the Sunnah. He accepted *Mursal* and weak narrations if there was nothing else on the topic. He used analogical reasoning when necessary.

Many reputable scholars refused to accept and recognize Imām Aћmad's school in matters of Jurisprudence. They maintained that he was a specialist in Ħadīth only.

This is not so because his school did eventually spread and there were many scholars of note who adopted his school and verdicts in jurisprudence.

12. Dāwūd ibn ʿAlī Al-Zhāhirī (200-270). He was a scholar of Ħadīth while in jurisprudence he chose to judge in the light of the apparent meanings and purport of the Qur'ānic verses and Ħadīth. He rejected analogical reasoning and maintained that the basis of jurisprudence is the Qur'ān, the Sunnah and *Ijmāʿ* only.

Because of his rejection of analogical reasoning, which we already established as an acceptable practice that was even used by the companions, many scholars including Imām Al-Ħaramayn Al-Juwaynī have disregarded his school. Scholars of jurisprudence accused him of being stagnant in his approach. He was however a reputable scholar who had students and followers in Baghdad and Shiraz. His school reached Spain but failed to continue after 500 A.H.

He authored a number of works in jurisprudence like *Ibtāl Al-Qiyās, Khabr Al-Wāħid, Al-Khabr Al-Mūjib li Al-ʿIlm, Al-Ħujjat, Al-Khuśūś wa Al-ʿUmūm, Ibtāl Al-Taqlīd* and others.

Some of his students promoted his school. The most prominent were:

1. His son, Abū Bakr Muħammad (d. 297).
2. Muħammad ʿAlī ibn Aħmad ibn Ħazm (d. 456) was a renowned scholar of Spain (Andalus) who was very critical of the other schools. He authored *Al-Muħallā* in jurisprudence and *Al-Iħkām li Uśūl Al-Aħkām* in the Principles of Jurisprudence.

13. Muħammad ibn Jarīr Al-Ŧabarī (d. 310) was an outstanding and accomplished scholar in all Islamic sciences. His monumental Tafsīr is sufficient proof of his expertise. He narrated from the students of Imām Al-Shāfiʿī and Imām Mālik.

A number of scholars followed his school but his school also failed to continue after 400 A.H.

Some of his followers were:

1. ʿAlī ibn ʿAbd Al-ʿAzīz Al-Dawlābī

2. Abū Bakr Muħammad ibn Aħmad ibn Abī Al-Thalj.
3. Abū Al-Ħasan Aħmad ibn Yaħyā. He authored *Al-Madkhal ilā Madhhab Al-Ŧabarī.*

Imām Al-Ŧabarī suffered at the hands of some fanatical followers of the Ħanbalī school when he failed to include Imām Aħmad among the renowned jurists and also because of the latter's position on some of the verses of the Qur'ān that describe Allah in anthropomorphic terms. They stoned him and this eventually led to his death.

Al-Ŧabarī is one of the scholars who contributed greatly through writing. Some scholars have estimated that he wrote about 350 000 pages.

This century witnessed the presence of the remaining five *Mujtahids*; it was a period wherein we observed the debate between some scholars over the preference of some forms of evidence over others in matters of jurisprudence. There was the debate between the Zhāhirī School and others over the usage of analogical reasoning and the preference of Ħadīth over and above *Ijmā'* as was the case with the Ħanbalī School. While the Ħanafī School seemed to prefer the view and verdict of a companion instead of resorting to analogical reasoning.

These five *Mujtahids* in some way avoided over engaging themselves in using rationalism and reason (*ra'y*) and instead were more inclined towards the apparent meanings and implications of the Qur'ānic verses and Ħadīth. This was their approach, despite the fact that philosophy and related subjects had entered the realm of Islamic scholarly work including the subjects of Islamic Dogma. Somehow it did not directly influence the nature of Islamic Jurisprudence. This may be due to the fact that many of the Ħadīth compilations were by now complete.

The Mu'tazilite and their ideology in matters of Islamic Dogma that resulted from their preference for reason and intellect over the Divine text is another factor that somehow discouraged these *Mujtahids* from using analogical reasoning. This trend

seemed to continue until Imām Abū Al-Ħasan Al-Ashʿarī dealt with and responded to the Muʿtazilites.

During this period we observed disagreement and differences in various issues that are of a daily nature like the *Adhān* and the *Iqāmah*. This may perplex some people because these are actions that are observed five times daily.
Some of this was due to different *Ijtihād*, but most of it was due to the different Ħadīth and the implications and applications of meanings derived from them.

4.2 Emergence of Tasawwuf
The formal emergence of Tasawwuf as an organized science also influenced the nature of Islamic scholarship in general and the jurisprudence in particular.
As the years went by, we find that during the time of Sarī Al-Saqtī (d. 251) Greek and Indian ideas entered some Sūfī writings.
Likewise there were great Sūfī scholars who wrote extensively like Al-Ħārith Al-Muħāsibī (d. 243). One of the renowned Sūfī scholars of this time was Sahl ibn ʿAbd Allah Al-Tusturī (d. 283) who said; "Our basis is that we hold on to the Qur'ān and follow the Sunnah, consume *Ħalāl*, avoid harming anyone, repent and fulfill the rights of people."[4]

Imām Al-Junayd (d. 297) was a renowned Sūfī scholar whose method was strongly attached to knowledge of Islam and its practice.
There were some Sūfīs who tarnished the name and practice of Tasawwuf by indulging in and promoting the concept of *Waħdat Al-Wujūd*. Ibn Khaldūn and others suggest that these ideas emerged because of their association with the Ismāʿīlī Shīʿah group.[5]

When we look back, we notice that during the third century the scholars delved deeply into the study of jurisprudence and they utilized Tasawwuf to complete and perfect their spiritual development. This pure and unadulterated form of

Tasawwuf has its roots in the famous Ħadīth of Jibrīl when he questioned the Prophet about some important aspects of Islam that included questions on *Iħsân*.[6]

As the culture of writing gained momentum in the Muslim World, some scholars started authoring books that were dedicated to subjects of Tasawwuf. These books were regarded as the completion of the science of Islamic Jurisprudence. Some of these books and authors are:

- *Risālah Al-Qushayrī* by Imām ʿAbd Al-Karīm Al-Qushayrī
- *Qūt Al-Qulūb* by Abū Ŧālib Al-Makkī
- *Ihyā ʿUlūm Al-Dīn* by Imām Al-Ghazālī
- *Al-Ghunyat li Ŧālib Ŧarīq Al-Ħaq* and *Futūħ Al-Ghayb* by ʿAbd Al-Qādir Al-Jaylānī (d. 561)
- *Nuzhat Al-Qulūb wa Bughiyat Al-Maŧlūb* by Abū Al-Ħasan Al-Shādhlī (d.656)
- *Al-Fuśūl Al-Sittah wa Faśl Al-Khitāb* by Muħammad ibn Muħammad Al-Bukhāri Al-Naqshbandī (d. 865) a successor of Bahā Al-Dīn Al-Naqshbandī (d. 791)
- *Al-Ħikam* by Aħmad ibn Muħammad ibn ʿAŧā Allah Al-Iskandarī (d. 907)

There were some Sūfī scholars who concentrated on certain rituals and practices and they occupied themselves with words and expressions that contained hidden meanings. In fact this reached a point in some parts of the Muslim world where there were more *zāwiyahs* (Sūfī corners or hospices used for gatherings of *dhikr*) than mosques. This trend resulted in various disputes among people based on their Sūfī affiliation.

Some scholars maintain that the formal emergence of Tasawwuf was responsible for a certain degree of weakness that affected jurisprudence and the caliber of jurists, because scholars now ignored what was necessary and essential. These scholars maintain that this over indulgence in matters of Tasawwuf led to the eventual collapse of jurisprudence in the seventh century when there were people who spent hours in public celebrations that included listening to music. This even

became a criterion for distinguishing people. The jurists were known as the People of the apparent and outward practices (*zhāhir*) and the scholars of Tasawwuf were known as the People of the Hidden and Inner practices (*bātin*).

As we progressed in this stage, we observed that nine schools of the thirteen *Mujtahids* failed to continue and we were left with four schools of jurisprudence namely that of Abū Ħanīfah, Mālik, Shāfiʿī and Aħmad ibn Ħanbal.
These schools became the ones that students studied and they eventually established themselves in certain parts of the world.

The school of Abū Ħanīfah was established in Iraq, parts of Russia, Khorasan, Tunisia, Spain and Fez. It later became the school of the Ottoman Turks and the dominant school in India.
The school of Mālik spread in Ħijāz, Basrah, Egypt and surrounding areas in Africa. It also established itself in Spain, Morocco and Sudan. It even gained some popularity in Baghdad while it somewhat weakened in Basrah after the year 500 A.H. There were traces of this school in Qazwīn and Naysābūr and it even spread to Yemen and Syria, but on a small scale.
The school of Al-Shāfiʿī spread and gained popularity as much as that of Abū Ħanīfah and Mālik. His school had many followers in Egypt, Iraq and many parts of Khorasan, Yemen and Syria. It even reached parts of Russia, Afghanistan, Spain and Africa.
The school of Aħmad ibn Ħanbal spread in Baghdad and then in different regions of Syria after which its followers somewhat decreased in number. More recently it spread in Saudi Arabia largely due to the Wahhābī Movement.

The followers and students of Abū Thawr and Ŧabarī were by no means many in number. Abū Thawr's followers failed to continue after the year 300 A.H., while Ŧabarī's followers seized after 400 A.H. The followers of Dāwūd Al-Zhāhirī were many in Baghdad and parts of Fez and fewer in Tunisia and Spain.[7]

Qāđī ʿIyāđ ibn Al-Dibāj is of the view that after a period when the thirteen *Mujtahids* were followed, there came a time when only five remained. These included the four schools of jurisprudence and the Zhāhirī school. But the Zhāhirī school ceased to exist while the other four continued. There were traces and remnants of other schools in different parts like the Zaydī school in Yemen.

Imam Al-Suyūŧī said that the four schools of jurisprudence survived and were firmly established in the Muslim world after the year 500 A.H. which can be attributed to the death of the scholars and the lack of enthusiasm and the people's willingness to adopt one of the four schools.[8]

As already mentioned the Zaydī existed in Yemen. They are the followers of Imām Zayd ibn ʿAlī Zayn Al-ʿAbidīn ibn Al-Ħusayn ibn ʿAlī ibn Abī Ŧālib. Imām Zayd studied under Wāśil ibn ʿAŧā, the promoter of Muʿtazilite ideas; because of this some Muʿtazilite concepts are to be found in Zaydī teachings. They permit the leadership of a person even though one who is more suitable and deserving maybe present. This principle is used to interpret the leadership of Abū Bakr over that of ʿAlī. They do not fall within the category of the Rejector (*rawāfiđ*) Shīʿahs, in fact there was a time when some of them even followed the school of Abū Ħanīfah. Some of its followers adopted other schools because the Imāms of the Zaydī school claimed to make *Ijtihād*. However, in reality they didn't go beyond the scope of the four schools.
Some of the Zaydī scholars who contributed to Jurisprudence are:

- Yaħyā ibn Al-Ħusayn Al-Rāsi (d.250)
- Al-Ħasan ibn ʿAlī ibn Al-Ħasan, Nāśir Al-Ħaq.
- Aħmed ibn Murtađā Al-Ħusayn Al-Mahdawī. He really played a major role in familiarizing people with this school through his book *Al-Azhār* and its commentary *Al-Ghayth Al-Midrār*.
- Muħammad ibn ʿAlī Al-Shawkānī (d. 1250). He was an established scholar and a Judge. He authored *Nayl Al-Awŧār, Sharh Al-Azhār* in Jurisprudence and *Irshād Al-Fuħūl* on the principles of jurisprudence.

There were other Shīʿah scholars who contributed to jurisprudence by authoring some books. Yaʿqūb ibn Kals authored a book on the jurisprudence of the Ismāʿīlī Shīʿah. The Fāŧimids tried to promote it and in the process they tried to suppress the school of Mālik and his book *Al-Muwattā*. Later, the Shīʿahs spread to Iran where they are to this day the majority. They have their jurists and their own literature.[9]

4.3 Some accomplished scholars in the third and fourth centuries.

During the third and fourth centuries there were a number of accomplished scholars who may have reached the level of *Ijtihād*. Some of these scholars were:[10]

1. Al-Fađl ibn Dukayn who was from Kufah. He passed away in 219 A.H.
2. Sulaymān ibn Ħarb Al-Azdī who was the Judge of Makkah. He passed away in 224 A.H.
3. Al-Qāsim ibn Sallām Al-Azdī who was from Baghdad. He passed away in 224 A.H.
4. Yaħyā ibn Yaħyā ibn Bukayr who studied under Mālik and some of his contemporaries. He passed away in 226 A.H.
5. Saʿīd ibn Manśūr who was from Khorasan. He authored a book known as *Sunan*. He passed away in 227 A.H.
6. Yaħyā ibn Maʿīn who was from Baghdad. He wrote about 600 000 Ħadīth. Illustrious scholars like Al-Bukhārī, Muslim and Abū Dāwūd studied under him. He died in 233 A.H.
7. ʿAlī ibn ʿAbd Allah ibn Nujayħ. He died in 234 A.H.
8. Abū Bakr ʿAbd Allah ibn Muħammad ibn Abī Shaybah. He passed away in 235 A.H. and is the author of *Al-Muśannaf*.
9. Khalīfah ibn Khayyāŧ who died in 240 A.H. He is the author of *Al-Ŧabaqāt*.
10. ʿAbd Allah ibn ʿAbd Al-Raħmān Al-Dārimī. He died in 255 A.H. He was from Samarqand and is the author of *Al-Musnad.* He was an accomplished scholar of Ħadīth and jurisprudence.

11. Muħammad ibn Ismāʿīl Al-Bukhārī. He died in 256 A.H. He is regarded as the leader of the scholars of Ħadīth and his book *Al-Jāmiʿ Al-Śaħīħ* (*Śahīħ Al-Bukhārī)* is the most authentic work after the Qur'ān. About 90 000 scholars narrated this book from him in his lifetime.
12. Muslim ibn Al-Ħajjāj Al-Qushayrī. He died in 261 A.H. and is the compiler of the famous Ħadīth work that is second after *Śaħīħ Al-Bukhārī.*
13. Abū Zurʿah Al-Rāzī. He died in 264 A.H. He is said to have memorized about 700 000 Ħadīth.
14. Abū Dāwūd, Sulaymān ibn Al-Ashath Al-Sijistānī. He died in 275 A.H. His book *Al-Sunan* is essential for any student of Islamic Jurisprudence.
15. Abū ʿEsā, Muħammad ibn ʿEsā Al-Tirmidhī. He died in 279 A.H. He is the author of the famous *Jami*ʿ which is one of the six famous Ħadīth compilations. He arranged the Ħadīth according to the rulings in jurisprudence.
16. Abū ʿAbd Al-Raħmān, Aħmad ibn Shuʿayb Al-Nisā'ī. He died in 304 A.H. and is the author of the last of the six major Ħadīth compilations.
17. Abū Bakr Muħammad ibn Isħāq ibn Khuzaymah. He died in 311 A.H. He is said to have memorized juristic rulings the way people memorize verses of the Qur'ān
18. Abū Ħafs, ʿUmar ibn Aħmad ibn Shāhīn. He died in 335 A.H. He is the author of about 330 works.
19. Abū Ħātim, Muħammad ibn Ħibbān. He died in 354 A.H. He was a specialist in Ħadīth and Jurisprudence and served as a Judge in Samarqand.
20. Abū Al-Qāsim, Sulaymān ibn Aħmad Al-Lakhmî Al-Ŧabarānī. He died in 360 A.H. He travelled for about thirty three years acquiring knowledge and is the author of the famous *Maʿājim*.
21. Abū Bakr Aħmad ibn Ibrāhīm Al-Ismāʿīlī. He died in 371 A.H. and was from Jurjān. Imām Al-Dhahabī referred to him as an authority in Ħadīth and jurisprudence.
22. Abū ʿAbd Allah, Muħammad ibn Isħāq ibn Mandah. He died in 395 A.H.

The above are some of the scholars. Because of the need of brevity I avoided lengthy profiles. Some of these scholars may have followed Imām Al-Shāfiʿī in certain issues but they were still probably capable of engaging in *Ijtihād*.

During the third and fourth centuries there were scholars of the four schools of jurisprudence that contributed to the spread of the respective schools by documenting the legal rulings and then promoting them.

I will attempt to list and name some of the scholars of these four schools who fulfilled this role.

4.3.1 In the Ħanafī school:[11]

1. Ibrāhīm ibn Rustum Al-Marwazī who died in 211 A.H. He authored *Al-Nawādir* in Ħanafī Jurisprudence. He narrated from Muħammad ibn Al-Ħasan and Imām Mālik.
2. ʿEsā ibn Abān who died in 221 A.H. He was scholar of Ħadīth and a Judge.
3. Aħmad ibn ʿAmr Al-Khaśśāf who died in 261 A.H. He is the author of *Al-Awqāf*.
4. Abū Jaʿfar, Aħmad ibn Muħammad Al-Ŧaħāwī. He died in 321 A.H. He initially followed the Shāfiʿī school and then adopted the Ħanafī school. He was a specialist in Ħadīth and jurisprudence and authored many useful books that include *Maʿāni Al-Athār.*
5. Abū Manśūr, Muħammad ibn Muħammad Al-Māturidī. He died in 333 A.H. He was a leading scholar in matters of theology and authored some books on the principles of jurisprudence.
6. Abū Bakr, Aħmad ibn ʿAlī Al-Jaśśāś. He died in 370 A.H. He was a student of Al-Karkhī and the commentator of books written by his teacher and Al-Ŧahāwī.
7. Abū ʿAbd Allah, Yūsuf ibn Muħammad Al-Jurjānī. He died in 398 A.H. He is the author of *Khazānat Al-Akmal*.
8. Abū Bakr, Muħammad ibn Mūsā Al-Khawārizmī. He died in 403 A.H.

4.3.2 The following are some of the famous Mālikī scholars during this period:[12]

1. Abū Marwān, ʿAbd Al-Malik ibn ʿAbd Al-ʿAzīz Al-Mājishūn. He died in 212 A.H. He was a leading *Muftī* of this school and he promoted the school in Madīnah.
2. Asad ibn Al-Furāt. He died in 213 A.H. He heard the *Muwattā* from Mālik and he travelled to Iraq where he studied under Abū Yūsuf and Muħammad ibn Al-Ħasan, the two students of Imām Abū Ħanīfah. He promoted the issues and rulings contained in the *Mudawwanah* in Qayrawān.
3. Abū Muħammad, ʿAbd Allah ibn ʿAbd Al-Ħakam. He died in 214 A.H. He was very acquainted with issues in this school and was a close friend of Imām Al-Shāfʿī. He summarized Ashhab's books in a single book that is said to contain about 18 000 juristic rulings. This was at the time when the trend to summarize and condense large detailed works actually began.
4. Yaħyā ibn Yaħyā Al-Laythī. He died in 234 A.H. He is one of the most famous narrators of *Al-Muwattā*. He is responsible for promoting the school in Spain (Andalus) and he even encouraged the governors to appoint Judges who belonged to the Mālikī school.
5. Suħnūn ʿAbd Al-Salām ibn Saʿīd Al-Tanūkhī. He died in 240 A.H. He took the *Mudawwanah* by Asad to Ibn Al-Qāsim who verified and corrected it. He then promoted it in Spain and Qayrawān. He is also responsible for making the school the dominant one in North Africa.
6. Abū ʿAbd Allah, Muħammad ibn Ibrāhīm ibn Al-Mawwāz. He died in 269 A.H. and is the author of one of the most reputable books in this school known as *Al-Mawwāziyah*.
7. Abū Isħāq, Ismāʿīl ibn Isħāq. He died in 282 A.H. He is the author of *Aħkām Al-Qurān* and *Al-Mabsūt* in jurisprudence. Because of his expertise

as a scholar the school of Mālik spread in Iraq. He was also an accomplished Judge.

8. Abū Al-Ħasan, ʿAlī ibn Ismāʿīl Al-Ashʿarī. He died in 334 A.H. Although he was an expert in jurisprudence, he is more noted for his contribution to theology and dogma. He spent about thirty years as Muʿtazilite and then questioned their positions in theology. He found answers to these questions in the Sunnah. He publicly denounced the Muʿtazilite views.
9. Abū Muħammad, ʿAbd Allah ibn Abī Zayd. He died in 386 A.H. He was an expert in the Mālikī school and his written books are widely acclaimed. His book, *Al-Ziyādāt 'alā Al-Mudawwanah* in the Mālikī school is compared to *Musnad Aħmad* in the Ħanbalī school.
10. Abū Bakr, Muħammad ibn Al-Ŧayyib Al-Bāqillānī. He died in 403 A.H. He was a respected Judge and one who contributed greatly to the Ashʿarī school in Islamic Dogma.

4.3.3 The following are some of the famous Shāfiʿī scholars in this period:[13]

1. Abū Yaʿqūb, Yūsuf ibn Yaħyā Al-Buwayŧī. He died in 231 A.H. He was a close associate of Imām Al-Shāfiʿī and succeeded him in his study circle. He wrote the famous *Al-Mukhtaśar* wherein he summarized and gathered Imām Shāfiʿīs views.
2. Abū Ibrāhīm, Ismāʿīl ibn Yaħyā Al-Muzanī. He died in 264 A.H. He was a leading Shāfiʿī scholar and the author of books that are regarded as references in this school. Some Shāfiʿī scholars regard some of his views as being outside the principles of jursiprudence of this school.
3. Abū Zurʿah, Muħammad ibn ʿUthmān ibn Zurʿah. He died in 302 A.H. He was an influential Judge who is the first person to introduce this school to Damascus. In fact, he gave one hundred Dinārs to anyone who memorized *Mukhtaśar Al-Muzanī*.
4. Abū ʿAlī, Al-Ħasan ibn Al-Qāsim Al-Ŧabarī. He died in 305 A.H. and is one of the first scholars to write on the differences of opinion amongst the jurists. He authored books like *Al-Ifśāħ* and others.

5. Aħmad ibn ʿUmar ibn Surayj. He died in 306 A.H. and was a Judge in Shiraz. He authored about four hundred books. Al-Subkī regards him as a reviver (*mujaddid*) of the Islamic Sciences in his era.
6. Abū Bakr, Muħammad ibn ʿAbd Allah Al-Śayrafī. He died in 330 A.H. He is one of the most knowledgeable authorities in the principles of jurisprudence after Imam Al-Shāfiʿī. He authored a few books including a commentary to *Al-Risālah*.
7. Abū Isħāq, Ibrāhīm ibn Aħmad Al-Marwazī. He died in 340 A.H. He taught the jurisprudence of this school in Iraq.
8. Abū Al-Ħasan, ʿAlī ibn ʿUmar Al-Dāraquŧnī. He died in 385 A.H. He was a specialist in Ħadīth and jurisprudence and is the author of *Al-Sunan* and other works.
9. Abū Sulaymān, Ħamd ibn Muħammad Al-Khaŧŧābī. He died in 388 A.H. He is the author of *Maʿālim Al-Sunan* a commentary to *Sunan Abī Dāwūd*.
10. Abū Bakr, Muħammad ibn Al-Ħasan ibn Fawrak. He died in 406 A.H. and is the author of about one hundred works on various subjects. He responded to the beliefs and mistakes of some of the deviant sects and groups.
11. Abū Ħāmid, Aħmad ibn Muħammad Al-Isfarāyīnī. He died in 408 A.H. He was a reputable jurist of Iraq.

4.3.4 Some famous scholars of the Ħanbalī school were:[14]

1. Abū Yaʿqūb, Isħāq ibn Manśūr Al-Kawsaj Al-Marwazī. He died in 251 A.H. and was very familiar with the verdicts of Imām Aħmad and Imām Isħāq.
2. Abū Al-Fađl, Śāliħ ibn Aħmad. He died in 266 A.H. He is Imām Aħmad's son and he promoted his father's verdicts. He was a Judge in Isfahan.
3. Abū ʿAbd Al-Raħmān, ʿAbd Allah ibn Aħmad. He died in 290 A.H. and is another one of Imām Aħmad's sons. He reported the *Musnad* and Tafsīr from his father.

4. Abū Bakr, Aħmad ibn Hārūn Al-Khallāl. He died in 311 A.H. He authored many works in jurisprudence.
5. Abū Bakr, ʿAbd Allah ibn Abī Dāwūd Al-Sijistānī. He died in 316 A.H. and was a leading scholar of this school in Baghdad.
6. Abū Al-Qāsim, ʿUmar ibn Al-Ħusayn Al-Khiraqī. He died in 334 A.H. and authored *Al-Mukhtaśar* and other works.

When we look at the callibre of scholars of the four schools of jurisprudence in this stage, we understand what is meant by the stage of maturity. The following are some additional observations on this period and they include those made by Shaykh Muśŧafā Zarqā (d. 1999), a renowned scholar and jurist.:[15]

(a) *Taqlīd* spread to a great extent while unconditional *Ijtihād* decreased substantially. Some scholars openly announced the closure of the doors of *Ijtihād*.

(b) There was an apparent degeneration in morals and people's loyalty to the religion. Sometimes, the jurists in their quest to please the kings and rulers looked for loopholes.

(c) There was great debate among the scholars of the different schools of jurisprudence. Sometimes this was motivated by the search for the truth while at other times this was done in king's courts in order to promote one's own school. This resulted in the development of the science and etiquette of debate and argumentation with scholars like Muħammad ibn Suħnūn in the third century and Al-Qaffāl Al-Kabīr in the fourth century authoring books on the topic.

(d) The disagreement between the school of Ħadīth and reason reached a point where the scholars eventually accepted and acknowledged that this was an acceptable approach in jurisprudence and not one based on conjecture.

(e) In some cases the governments adopted certain schools. The ʿAbbāsids for example adopted the Ħanafī school.

(f) The scholars and jurists increased their reliance on hypothetical rulings, which initially was a positive contribution to jurisprudence, but it resulted

in a negative effect when the scholars began predicting situations that were almost impossible. In this way, they moved further from the reality and practical occurences.

(g) This was a period when some of the *Fiqh* Maxims were documented and expanded on.

The debates between the scholars stimulated academic growth and exposed the public to their scholar's which at times had a negative impact on Islamic Jursiprudence. The most eloquent scholar was awarded with prizes and gifts by the king and this did not promote the truth and reduce disagreement, instead people's intentions and motives were flawed and disagreement increased. Sometimes these gatherings were dominated by the state and became political tools for the leader who intended to promote his ideology as was the case with Al-Ma'mūn Al-ʿAbbāsī and his view on the creation of the Qur'ān.

In the fourth century, the idea of preparing summaries and condensed versions of lengthier juristic works began. This included the documentation of juristic rulings without supporting them with proof and evidence. Thereafter scholars engaged in preparing commentaries to these.
In the third century, the scholars were somewhat innovative in their approach to jurisprudence, wheras in the fourth century this changed.

Sometimes there was a kind of 'competition' between the scholars of the different schools when one tried to portray his school as better or superior to the other. This also had a negative impact on jurisprudence.
In the fourth century, the Mālikī school in Morocco in particular suffered at the hands of the Shīʿah who killed some senior scholars. They tortured and killed scholars who did not pronounce *Fatwās* that complied with Shīʿah teachings. They prevented their study circles in the mosques. At one instance, in Qayrawān, about eighy-five people were killed.

Despite this repression, they failed to wipe out the Mālikī school, instead it continued to spread silently because this was the wish of the people. This eventually led to the disintergration and the dissolving of the Shīʿah Empire and the re-emergence of the Mālikī school.[16]

Notes to Chapter Four

1. Al-Nawawī, *Al-Majmūʿ Sharh Al-Muhadhdhab*, Jeddah, Maktabat Al-Irshād, vol.1, p.54

2. Abū Zahrā, Muħammad, *Tārīkh Al-Madhāhib Al-Islāmiyah*, Beirut, Dār Al-Fikr Al-ʿArabī, p.435 also Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol.2. p.51

3. Ibid, vol.2, p.51

4. Al-Muħāsibi, Al-Ħārith, *Risālah Al-Mustarshidīn*, Beirut, Al-Maktabah Al-Islāmiyah, p.3-20 also Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol.2, p.55

5. Ibn Khaldūn, *Muqaddamah*,

6. Al-Bukhārī, *Śaħīħ Al-Bukhārī, Kitāb Al-Imān*, Ħadīth no. 47, and Sūrah Al-ʿAnkabūt, verse: 69

7. Zarqā, Muśŧafā, *Al-Fiqh Al-Islāmī wa Madārisuhu*, Damascus, Dār Al-Qalam, 1998, p.70

8. Al-Suyūŧī, Jalāl Al-Dīn, *Risālah Al-Ijtihād,* Cairo, Maktabat Wahbah

9. Al-Ħajwī, *Al-Fikr Al-Sāmī,* vol.2, p.72

10. Ibid, vol.2, p. also Al-Dehlawī, Shāh Walī Allah, *Ħujatullah Al-Bālighah*, vol.1, p. 280 and Al-Dhahabī, *Siyar A'lām Al-Nubalā*, vol. 8, p. 448, vol. 9. p. 183, 243, 359, vol. 10. p. 173, 277, 379, 567, 610, vol. 12. p. 263-264, 471.

11. Qutlūbagha, Qāsim, *Tāj Al-Tarājim*, p. 86, 96-97 also Al-Kawtharī, Muħammad Zāhid, *Fiqh Ahl Al-'Irāq wa Ħadīthuhum*, p.63 and Al-Laknawī, Muħammad ʿAbd Al-Ħayy, *Al-Fawā'id Al-Bahiyyah fī Tarājim Al-Ħanafiyah,* Idārat Al-Qur'ān wa Al-ʿUlūm Al-Islāmiyah, Pakistan, 1998, p. 196, 255, 265, 305.

12. Abū Zahrā, Muħammad, *Tārīkh Al-Madhāhib Al-Islāmiyah*, p. 431 also Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol.2, p. 94 also Al-Dhahabī, *Siyar A'lām Al-Nubalā*, vol. 9. p11, 97. vol. 10. p. 70. vol. 11 p. 540, vol. 12. p.564, vol.13 p. 114

13. Ibid, p.480, Al-Subkī, *Ŧabaqāt Al-Shāf'iyah Al-Kubrā*, Egypt, Hajr li Al-Ŧibāʿah, vol. 2. p. 93-109, vol. 3 p. 21-40, 186-187, 282-290 and Al-Dhahabī, *Siyar A'lām Al-Nubalā*, 1997, vol. 10. p. 67, vol. 11. p. 265

14. Ibid, p.548 also Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol.2, p.135

15. Zarqā, Muśŧafā, *Al-Madkhal Al-Fiqhī Al-'Aām*, Beirut, Dār Al-Fikr, vol.1, p.171 also Al-Dehlawī, Shāh Walī Allah, *Ħujatullah Al-Bālighah*, vol. 1, p. 280

16. Abū Zahrā, Muħammad, *Tārīkh Al-Madhāhib Al-Islāmiyah*, p. 273

Chapter Five

The Fourth Stage: The period of 'old age' or 'degeneration' of Islamic Jursiprudence (from the beginning of the fifth century until present)

This stage commences from the beginning of the fifth century and continues until the present. As we have have already noticed from the preceeding chapters, Islamic jurisprudence matured and reached its highest point. In this stage, it 'declined' to a significant extent and this may be attributed to the following:

- A greater inclination towards attempting to choose the strongest view or ruling in a particular school of jurisprudence (*tarjīħ*).
- Many scholars occupied themselves with lengthy commentaries on earlirer works.
- Many were preoccupied with condensing, abridging and summarizing other works in Jurisprudence. This was done in such a way that they combined as many rulings as possible with as few words as possible. The process of writing poetry texts (*mutūn*) began and eventually became the adopted method and approach in studying jurisprudence. Although, these texts contained immense benefit with regard to verifying and illucidating the purport of words. Sometimes, the real objective and motive was not realized.
- Some scholars were preoccupied with writing footnotes and marginal notes to older works.

The political instability in the Muslim World in the early fifth century affected the growth and development of Islamic Jurisprudence because it resulted in less contact between the scholars of the different areas. Various empires ceased to exist after they were taken over by others.

The Muslim Empire in Morocco and surrounding areas was rescued with the coming of influential leaders that included the likes of Yūsuf ibn Tāshfīn, who established Islam and promoted jurisprudence. Due to his efforts, the Mālikī school flourished, while in Qayrawān and Tunisia they continued to suffer at the hands of the Fāŧimid Shīʿah's.[1]

After Yūsuf ibn Tāshfīn and his son, there was once again a period of degeneration until about 555 A.H. It was around about this time when the Muwaħħidūn appeared. They were responsible for some kind of academic revival. In fact, there were some leaders who even discouraged the strict adherence to the Mālikī school and they instead promoted *Ijtihād*. Yaʿqūb Al-Manśūr, was one such leader who is supposed to have burnt books in the Mālikī School and he even instructed some scholars of Ħadīth to gather Aħādīth from ten Ħadīth compilations on juristic matters. In reality, he really turned people away from the Mālikī School and compelled them to follow the Zhāhirī School. As soon as he died, people returned to the Mālikī School. Despite their efforts, there were scholars like Abū Al-Ħasan ʿAlī ibn ʿIshrīn and others who were able to dictate the entire *Mudawwanah* from memory and thus they preserved the school of Mālik.
The Muwaħħidūn's failure to promote the Zhāhirī School can be attributed to the following factors:

- They wished to compel people to accept their school.
- They labeled it as *Ijtihād*, but in reality they were promoting the Zhāhirī School.
- They were succeeded by another empire, who undid whatever they had hoped to achieve. This is partly due to the fact that they were not necessarily keen on promoting the religion, rather they wished to eradicate the Mālikī School.

This continued until very recently where Islamic Jurisprudence could be described as being divided into three types:

1. Islamic Jurisprudence as per the *Muwattā* and the *Mudawwanah*.
2. Jurisprudence as per the rulings and verdicts of the Judges.
3. Jurisprudence that was government controlled.

The Islamic Empire continued to weaken until it eventually collapsed in Spain. By 1011 A.H., almost everyone in Spain (Andalus) was forced into Christianity. Books and institutes of learning were destroyed and some historians mention that the Cardinal even burnt about 80 000 Arabic manuscripts in Granada. Much of the Islamic Legacy was lost due to these incidents.

In the East, there were bloody wars particularly when the crusaders took over Syria and surrounding areas. Once again, when it seemed that the muslims were in a serious crisis, they were rescued by a dynamic leader, Śalāħ Al-Dīn Al-Ayyūbī, who liberated Masjid Al-Aqśā from the crusaders and Egypt was freed from the Fāŧimid's.

Iraq on the other hand was the capital of the Islamic Empire (*Khilāfat*) but it too sufferred a great calamity and test. The Muslims had never witnessed something as destructive as this. The Tartars under Haulaku took over Baghdad and killed hundreds of thousands of Muslims. The Muslim leader, Al-Muʿtaśim Al-ʿAbbāsī was killed in 656 A.H. Many schools were destroyed and thousands of books were burnt.

Not long thereafter, before the year 700 A.H., Haulaku's grandson accepted Islam along with about 100 000 soldiers who were eager to redeem themselves. Towards the end of the eigth century, Timur Link, a Tartar conquered parts of Iran, and regions of Asia and even advanced towards China.

In about the seventh century, the Turkish Ottoman Empire emerged and gradually grew in strength and consolidated its control. They managed to spread to areas like Greece, Bulgaria, Bosnia, Hungary and many regions of Russia. While the Muslims were suppressed in Spain (Andalus), in the East they were gaining momentum.

However, the major centers of learning that included Baghdad, Damascus, Cordoba and others enjoyed similar attention under the Ottomans as with other Empires and dynasties. The Ottomans declared Istanbul (Constantinople) as their capital and the other cities were required to comply. Turkish was the language of the Ottomans and thus became the official language. With the result, the progress of Islamic Jurisprudence was hampered, because Islamic Jursiprudence in particular and the other Islamic Sciences in general are governed by the Arabic Language which is the Language of the two divine sources; the Qur'ān and the Sunnah. The scholars and judges who were appointed were all proficient in Turkish and thus did not engage in much *Ijtihād*, instead they busied themselves with summaries and marginal notes. Because the Ottomans were predominantly adherents of the Ħanafī School, it in turn gained more popularity and recognition. They still managed to preserve the original form and approach to Islamic Jurisprudence.

This continued until the Muslim Empire was forced to split into smaller states because of pressure from Russia and other power hungry colonizing nations that included Britain. During this period, there were many fierce and bloody battles for freedom and independence. Because the inhabitants of the Muslim Lands were largely involved in the fight for survival, the state of Islamic Jursiprudence and the Arabic Language suffered. 2

It is worthy to note however, that as a result of their insistence to promote the Zhāhirī School, many specialist Ħadīth scholars were produced.

Another factor that had a negative impact on Islamic Jurisprudence was the effect of those who supposedly attained the ranks of '*Muftīs'*. In many cases, these people were not qualified and competent to carry out this great responsibility. The situation deteriorated until people began sufficing with statements of certain scholars in a particular school. In some cases, when they wished to educate a child, they adopted the following approach; they taught him the Qur'ān, then

rhetoric, therafter the *Muwattā* and then the *Mudawwanah*. This was followed by works by Ibn Al-ʿAttār and *Aħkām* Ibn Sahl. The situation would have worsened, were it not for scholars like Abū Al-Walīd Al-Bājī and others who inspired an amazing revival.

Sometimes the above mentioned approach led to the alienation of Islamic Jurisprudence from the Ħadīth, whereas they were previously inter-related. Some scholars tended to over indulge in trivial juristic matters and in the process they neglected the Sunnah. During this period, there were scholars who wrote volumes about the lives and virtues of their respective Imāms.

5.1 Some famous scholars in the period 500-1400

Despite the various negative factors that influenced the state and nature of Islamic Jursiprudence, there was still no shortage of scholars and jurists. The following are some of the scholars in the period 500-1400 A.H according to their respective schools:

5.1.1 In the Ħanafī School:[3]

1. Abū Al-Ħasan Aħmad ibn Muħammad Al-Qudūrī (d.438). He is the author of the famous *Mukhtaśar* in this school. He used to engage Abū Ħāmid Al-Isfarāyīnī, a leading Shāfʿī scholar in debate.
2. Abū Zayd ʿAbd Allah ibn ʿUmar Al-Dabbūsī (d. 430). He is the first of the Ħanafī scholars known to write about disagreement.
3. ʿAlī ibn Muħammad Al-Bazdawī (d. 482). He is the author of the famous *Al-Mabsūt* in about eleven volumes.
4. Abū Ħafs ʿUmar ibn Muħammad Al-Nasafī (d. 537). He was a renowned *Muftī* and the author of about one hundred books in Jurisprudence, Ħadīth, History and Tafsīr.
5. Muħammad ibn Aħmad Al-Sarakhsī (died towards the end of the century). He is the author of encyclopaedic work also known as *Al-Mabsūt* in about fifteen volumes. He was even regarded as a *Mujtahid* in the Ħanafī school.
6. Abū Bakr ibn Masʿūd Al-Kāsānī (d. 578). He is the author of the famous *Badāʾ Al-Śanāiʿ*.

7. ʿAlī ibn Abī ʿAbd Al-Jalīl Al-Marghaynānī (d. 593). He is the author of the acclaimed *Al-Hidāyah.*
8. ʿAbd Allah ibn Aħmad Abū Al-Barakāt Al-Nasafī (died after 710). He is the author of acclaimed books in Jurisprudence and its principles. He is also regarded as a *Mujtahid* in this school.
9. ʿUthmān ibn ʿAlī Al-Zaylaʿī (d. 743). He is the author of the famous book *Naśb Al-Rāyah* on the Ħadīth of *Al-Hidāyah*.
10. Al-Sharīf Al-Jurjānī (d. 816). He is the author of numerous commentaries.
11. Badr Al-Dīn Maħmūd ibn Aħmad Al-ʿAynī (d. 855). He was a scholar who excelled in many sciences and is the author of a lengthy commentary on *Śaħīħ Al-Bukhārī.*
12. Abū Al-ʿAdl Qāsim ibn Qutlūbaghā (d. 897). He is the author of many books including *Sharħ Al-Maśābīħ.*
13. Aħmad ibn Sulaymān ibn Kamāl Bāsha (d. 940). He was the *Muftī* of Istanbul and the author of the commentary to *Al-'Uddah* and a text in the Principles of Jursiprudence. In fact, he authored about 300 hundred woks.
14. ʿAlī ibn Muħammad Al-Harawī Al-Qārī (d. 1014). He was an accomplished scholar and the author of the commentary to the famous Ħadīth works, *Al-Mishkāt, Al-Shifā*, *Al-Shamā'il* and *Al-Nuqāyah* in Ħanafī Jurisprudence.
15. ʿAbd Allah ibn Muħammad Al-Amāsī (d. 1167). He authored a commentary to *Śaħīħ Al-Bukhārī* in about thirty volumes and another on *Śaħīħ Muslim* which he did not complete.
16. Shāh Walī Allah Al-Dehlawī (d. 1176). He is responsible for the revival of the Ħadīth sciences in India and the author of numerous excellent books. There were many renowned and accomplished scholars from this family.
17. Muħammad Murtađā Al-Zabīdī (d. 1205). He is the author of the famous commentary to *Al-Iħyā* by Imām Al-Ghazālī.
18. Muħammad Amīn ibn ʿAbidīn (d.1252). He is the author of *Radd Al-Mukhtār* which is regarded as the final word in the Ħanafī school.
19. Muħammad Affendī Al-Alūsī (d. 1270). He was the *Muftī* of the Ħanafi's in Baghdad and the author of the famous book in Tafsīr, *Rūħ Al-Ma'ānī.*

20. ʿAbd Al-Ħayy Al-Laknawī (d. 1304). One of the most knowledgeable in Ħadīth dealing with juristic matters.
21. Muħammad Anwar Shāh Kashmīrī (d. 1352). He is the author of many books.
22. Muħammad Bakhīt Al-Mutīʿī (d. 1935). He was a senior *Mufti* and a specialist in the Principles of Jursiprudence.
23. Muħammad Zāhid Al-Kawtharī (d. 1371). He was the Deputy Shaykh of the Ottoman Empire.
24. Zhafar Aħmad Al-ʿUthmānī (d. 1974). He is the nephew of an erudite scholar, Mawlānā Ashraf ʿAlī Thanwī and the author of the excellent work, *Iʿlā Al-Sunan*, wherein he supported every issue in the Ħanafī School with evidence from the Sunnah.
25. Muħammad Yūsuf Binnorī (d. 1977).
26. ʿAbd Al-Fattāħ Abū Ghuddah (d. 1997).

5.1.2 In The Mālikī School:4

1. Abū ʿAbd Allah Muħammad ibn ʿUmar Bashkawāl (d. 419). He was a scholar of Ħadīth and Jursiprudence. He memorized the *Mudawwanah* and *Al-Nawādir.*
2. Abū Dhar ʿAbd ibn Aħmad Al-Harawī (d. 435). He is famous narrator of *Śahīh Al-Bukhārī* and a person who studied under illustrious scholars like Al-Bāqillānī.
3. ʿAbd Allah ibn Yāsīn Al-Jazūlī (d. 451). He spread Islam along with Mālikī School in the desert regions of North Africa. He is regarded a true reviver (*mujaddid*) in this region.
4. Abū ʿUmar Yūsuf ibn ʿUmar ibn ʿAbd Al-Barr (d. 463). He was senior scholar of Ħadīth and an accomplished jurist of Andalus. He was a Judge, who may even be regarded as a reviver (*mujaddid*) in jurisprudence.
5. Abū Al-Walīd Sulaymān ibn Khalaf Al-Bājī (d. 494). He is the author of excellent commentaries to *Al-Muwattā* and a Judge in Andalus. He is also well known for his debates with Ibn Ħazm.

6. Abū Al-Walīd Muħammad ibn Aħmad ibn Rushd Al-Qurŧubī (d. 520). He was the leading jurist of Spain and Morocco. His book *Al-Bayān wa Al-Tahśīl* is one of the reliable books in this school and one of the books on which Shaykh Khalīl relied on.
7. Abū ʿAbd Allah Muħammad ibn ʿAlī Al-Māzirī (d. 536). He was one of the most accomplished jurists in his time and one of the last who truly treaded the path of *Ijtihād*. He wrote a commentary to *Śahīh Muslim.*
8. Abū Bakr Muħammad ibn ʿAbd Allah ibn Al-ʿArabī (d. 543). He is the author of *Ahkām Al-Qur'ān* in Tafsīr and a commentary to *Sunan Al-Tirmidhī.*
9. Abū Al-Fađl Iyāđ ibn Mūsā (d. 544). He was an accomplished scholar who was a *Muftī* and a Judge. He wrote the famous *Al-Shifā* and other reliable works in the Mālikī School.
10. Abū Al-Walīd Muħammad ibn Aħmad ibn Rushd (the grandson, d. 595). He was a renowned scholar and a Judge in spain. He authored the famous *Bidāyat Al-Mujtahid* and other works.
11. Abū ʿAmr ʿUthmān ibn Abī Bakr Ibn Al-Ħājib (d. 642). He was an expert in the Mālikī School and in the scinces related to the recitation of the Qur'ān. He wrote the famous *Mukhtaśar* that was used by all until *Mukhtaśar Khalīl* was written.
12. Abū Al-ʿAbbās Aħmad ibn Idrīs Al-Śanhājī Al-Qarāfī (d. 684). He authored *Al-Dhakhīrah* and *Al-Furūq*.
13. Abū Al-Fatħ Muħammad ibn ʿAlī Ibn Daqīq Al-ʿIīd (d. 702). He is credited for resolving some conflict between some Shāfiʿs and Mālikīs. Imām Al-Subkī and others even classified him as an independent *Mujtahid*.
14. Abū Isħāq Ibrāhīm ibn Mūsā Al-Shāŧibī (d. 790). He was a specialist in the Principles of Jursiprudence and authored books ike *Al-Muwāfaqāt*. Some classify him as a *Mujtahid*.
15. Abū Zayd ʿAbd Al-Raħmān ibn Muħammad ibn Khaldūn (d. 808). He was an accomplished scholar in the rational and literary sciences. He authored the famous *Muqadimah*. He was appointed as Judge in Egypt.

16. ʿAbd Al-ʿAzīz ibn Mūsā Al-ʿAbdūsī (d. 835). He promoted the School in Fez and Tunis.
17. Maħmūd ibn ʿUmar Al-Sanhājī (d. 855). He was a Judge in Timbuktu and one of the fisrt to introduce *Mukhtaśar Khalīl* to this region.
18. Abū Al-ʿAbbās Aħmad ibn Aħmad Zarrūq (d. 899). He was a renowned scholar of Ħadīth, a jurist and a Sūfī. He travelled extensively and wrote commentaries to *Al-Risālah* and *Mukhtaśar Khalīl.*
19. Abū Al-ʿAbbās Aħmad ibn Yaħyā Al-Wansharīsī (d. 914). One who carried the banner of this school in Africa. He authored *Al-Miʿyār* that includes the verdicts of jurists from Morocco, Spain and other parts of Africa.
20. Ibrāhīm ibn ʿAlī ibn Farħūn (d. 999). He was Judge in Madinah and the author of many books including one one the scholars in the Mālikī School.
21. Abū ʿAbd Allah Muħammad ibn Aħmad Mayārah (d. 1072). He authored useful books in jurisprudence like his commentary to *Al-Murshid Al-Muʿīn.*
22. Abū ʿAbd Allah Muħammad ibn ʿAbd Allah Al-Khurashī (d. 1101). He was the fisrt to assume the position as the Grand Shaykh of the Al-Azhar. He authored a reliable commentary to *Al-Mukhtaśar.*
23. Abū ʿAbd Allah Muħammad Al-Ŧayib Kayrān (d. 1227). He was an expert in all sciences and some maintain that he attained the level of *Ijtihād*.
24. Muħammad ibn Aħmad ʿUlaysh (d. 1299). He was the leading Mālikī scholar in Egypt and is often compared to Al-Shawkānī In Yemen. He authored a commentary to *Al-Mukhtaśar.*
25. Abū Muħammad Jaʿfar ibn Idrīs Al-Kattānī (d. 1323). He was an accomplished scholar and the author of many useful books.
26. Salīm Al-Bishrī (d. 1917). He was the leading Mālikī scholar after Shaykh ʿUlaysh and also assumed the position of Grand Shaykh of the Al-Azhar.
27. Sālim Bo Ħājib (d. 1342). He was senior Mālikī *Muftī* and a person who truly preserved the spirit of learning.

5.1.3 In the Shāfiʿī School:[5]

1. Abū Isħāq Ibrāhīm ibn Muħammad Al-Isfarāyīnī (d. 418). He is said to have attained the level of *Ijtihād*.
2. Abū Al-Ŧayyib Ŧāhir ibn ʿAbd Allah Al-Ŧabarī (d. 450). He was a *Muftī* and a Judge in Baghdad and the person from who the Iraqi's acquired knowledge of the Shāfiʿī School. He engaged in debates with Ħanafī scholars like Al-Qudūrī and Al-Ŧālaqānī.
3. Abū Al-Ħasan ʿAlī ibn Muħammad Al-Māwardī (d. 450). He is the author of the famous *Al-Ħāwī* in Jursiprudence. He was a Judge in many places.
4. Abū Bakr Aħmad ibn Al-Ħusayn Al-Bayhaqī (d. 458). He was a specialist in Ħadīth and he defended and promoted the school.
5. Abū Al-Maʿālī ʿAbd Al-Malik ibn ʿAbd Allah Al-Juwaynī (d. 478). He was an expert in Jursiprudence, its principles and in the rational sciences. He authored the acclaimed *Al-Burhān* on the Principles of Jursiprudence in the Shāfiʿī School.
6. Abū Ħāmid Muħammad ibn Muħammad Al-Ghazālī (d. 505). He authored many books including *Al-Mustaśfā,* which is one of the most widely accepted and acknowledged books on the Principles of Jursiprudence. His other famous work is *Iħyā 'Ulūm Al-Dīn.*
7. Abū Al-Qāsim ʿAlī ibn Abī Muħammad ibn ʿAsākir (d. 571). He was an expert scholar of Ħadīth and an accomplished Shāfiʿī jurist. He travelled extensively.
8. Abū ʿAbd Allah Muħammad ibn ʿUmar Fakhr Al-Dīn Al-Rāzī (d. 606). He was an outstanding scholar in the Principles of Jurisprudence and he even authored the famous *Tafsīr Al-Kabīr.*
9. Abū Muħammad ʿIzz Al-Dīn ibn ʿAbd Al-Salām (d. 660). He was known as *Sulťān Al-ʿUlamā*. He defended the religion fearlessly despite the efforts by the leaders to do otherwise.
10. Abū Zakariyā Yaħyā ibn Sharaf Al-Nawawī (d. 676). He is regarded as a *Mujtahid* in the Shāfiʿī School. He authored the famous commentary to *Śaħīħ Muslim* and *Al-Rawdah* in Jursiprudence.

11. Abū ʿAbd Allah Muħammad ibn Aħmad Al-Dhahabī (d. 748). He is known for his expertise in Ħadīth and the categories of the narrators. He authored books like *Al-Mīzān* and others.
12. Tāj Al-Dīn Al-Subkī (d. 771). He studied under his father and was a senior Judge, author and a person who was very critical of Ibn Taymiyah.
13. ʿImād Al-Dīn Ismāʿīl ibn Kathīr (d. 774). He was a specialist in Ħadīth, Tafsīr and History. He authored the famous book in Tafsīr and *Al-Bidāyah* wa *Al-Nihāyah* in History. He was pressurized for adopting Ibn Taymiyah's view in divorce.
14. Abū Ħafs ʿUmar ibn Raslān Al-Bilqīnī (d. 805). He was regarded by many as a *mujaddid* and a *Mujtahid* in the eighth century. He was one of the most reputable Shāfiʿī scholars in Egypt and even served as a Judge in Syria for a time.
15. Abū Al-Fađl Aħmad ibn ʿAlī ibn Ħajr Al-ʿAsqalānī (d. 852). The *Shaykh Al-Islam* of the Ħadīth Scholars and the author of the acclaimed commentary to *Śaħīħ Al-Bukhārī, Fatħ Al-Bārī*. He was an excellent Judge.
16. Abū Zayd ʿAbd Al-Raħmān ibn Abī Bakr Al-Suyūţī (d. 911). He authored about six hundred works and a person who was thought to have reached the level of *Ijtihād*.
17. Muħammad ibn Aħmad Al-Ramlī (d. 1004). He was known as the 'Junior Shāfʿī' and some have even referred to him as the reviver in the 10^{th} century. He was the senior *Muftī* of the Shāfiʿī School in Egypt.
18. Abū ʿAbd Allah Muħammad ibn ʿAbd Al-Rasūl Al-Barzanjī (d. 1103).
19. Shāh Walī Allah Al-Dehlawī (d. 1180). He was the *Mujaddid* of the 12^{th} century. Some scholars have classified him as Ħanafī scholar.
20. Muħammad ibn Sulaymān Al-Kurdī (d. 1194). An expert Shāfiʿī jurist of the Ħijāz.
21. Ibrāhīm ibn Aħmad Al-Bājūrī (d. 1277). He was the Shaykh of the Al-Azhar and the senior Shāfiʿī scholar in Egypt.
22. Sulaymān Al-Ahdal (d. 1935). An expert Shāfiʿī scholar from Yemen.

5.1.4 In the Ħanbalī School:[6]

1. Abū Al-Faraj ʿAbd Al-Wāħid ibn Muħammad Al-Shirāzī (d. 486). He promoted the school amongst the people of Damascus.
2. Abū Al-Wafā ʿAlī ibn ʿAqīl (d. 513). He was the leading scholar in the school in Baghdad. He is said to have authored *Al-Funūn* in about four hundred volumes.
3. Abū Al-Muzhaffar Yaħyā ibn Muħammad ibn Hubayrah (d. 560). He authored a book wherein he gathered the rulings from the four schools of jurisprudence.
4. Abū Al-Faraj ʿAbd Al-Raħmān ibn Abī Al-Ħasan ibn Al-Jawzī (d. 598). He was a leading scholar and author in Baghdad.
5. Abū Al-Barakāt ʿAbd Al-Salām ibn ʿAbd Alllah Majd Al-Dīn ibn Taymiyah (d. 652). He was a specialist in Ħadīth, Tafsīr and the Principles of Jursiprudence.
6. Abū Al-ʿAbbās Aħmad ibn ʿAbd Al-Ħalīm Ibn Taymiyah (d. 728). He was knowledgeable in Ħadīth and Tafsīr but was criticized for some views in Islamic Dogma and Jursiprudence. He died in prison. Many praised him and some of his views are expounded today by the Wahhābī 'Salafī' Movement.
7. Abū ʿAbd Allah Muħammad ibn Abī Bakr Ibn Qayyim Al-Jawziyah (d. 751). A student of Ibn Taymiyah and an author of numerous books.
8. Abū Al-ʿAbbās Aħmad ibn Al-Ħasan ibn Qudāmah (d. 771). He was the leading Ħanbalī scholar in his time and he is the author of an extensive work in jurisprudence called *Al-Mughnī.*
9. Abū ʿAbd Allah Muħammad ibn Mufliħ (d. 763). He was judge and one of the most accomplished scholars in this school. He authored commentaries to *Al-Muntaqā* and other works.
10. ʿAbd Al-Raħmān ibn Aħmad ibn Rajab (d. 795). He educated the Ħanbalī scholars in Syria.
11. Muħammad ibn Aħmad Al-Ħārishī (d. 1001). He was a leading Ħanbalī scholar and *Muftī* in Egypt and Al-Quds.

12. Aħmad ibn Abī Al-Wafā ibn Mufliħ (d. 1038). He taught in the famous Dār Al-Ħadīth in Damascus.
13. Manśūr ibn Yūnus Al-Bahūtī (d. 1051). He was a leading *Muftī* and the author of a commentary to *Al-Iqnāʿ* and other books in jurisprudence.
14. ʿAbd Al-Qādir ibn ʿUmar Al-Taghlibī (d. 1135). He taught in the Umawī Mosque in Damascus and wrote *Dalīl Al-Ŧālib* in the Ħanbalī School.
15. ʿAbd Al-Wahhāb ibn Sulaymān Al-Najdī (d. 1153). He is the father of Muħammad ibn ʿAbd Al-Wahhāb. He was an accomplished scholar in this school.
16. Abū ʿAbd Allah Muħammad ibn ʿAbd Al-Wahhāb (d. 1206). He promoted the school in the Arabian Peninsula but also had some views that were contradictory to the practice and belief of the majority of the Ahl Al-Sunnah. Some interpreted this as a political move, because he married into the Saʿūd family.
17. ʿAbd Al-Qādir Badrān (d. 1927)
18. Jamīl Al-Shaŧŧī (d. 1959).

When we look at the scholars mentioned from the 4th century, we find that they excelled in their respective schools of jurisprudence and abided by the respective principles. There was no independent *Mujtahid*. Later, there were scholars who had the ability to sift through the rulings in their school and select the strongest or the most applicable to a given situation. This was probably until the 8th century.

There were however certain individual scholars who pronounced *fatwa* in more than one school. These included Ibn Daqīq Al-ʿĪid who ruled according to the Mālikī and Shāfiʿī Schools and Shaykh Aħmad ibn ʿAbd Al-Munʿim Al-Damnahūrī (d. 1194) who ruled in all four schools.

More recently there were some claimants of independent *Ijtihād* that included Al-Shawkānī in Yemen and the Moroccan scholar, ʿAbd Allah Al-Ghumārī (d. 1991) who claimed to make *Ijtihād* in some issues. Sometimes the call to *Ijtihād* is

promoted by Muslim modernists and social scientists who maintain that the schools of jurisprudence are not equipped to deal with changing trends and thought processes. This call also received support from some who claim to want to reform the state of the Muslim society by returning to its pure and original sources, without being bound to the 'views' of men. However, the vast majority of scholars and jurists from the eighth century till the present day were adherents to one of the four schools of jurisprudence in practice and in teaching. A great amount of time and effort was allocated to elaborating and explaining the works of earlier scholars with marginal notes and even lengthy commentaries.

Taqlīd (following one of the four schools of jurisprudence without knowing the proofs and evidences) became the only acceptable approach. Many were not even prepared to engage in any fruitful discussion beyond their respective school of jurisprudence. The four schools of jurisprudence were firmly established among Muslims globally. The following geographical distribution of the different schools will help us understand this.

Imām Abū Ħanīfah's school developed in Kūfah, Iraq and then spread to Baghdad. It eventually spread to Egypt, parts of Russia and its republics, Iran, India, Pakistan, Afghanistan, Syria, Turkey, the Balkans and China including East Turkistan. This school was the official school that was followed in the courts in Egypt.

Imām Mālik's school was established in Madīnah and spread throughout the Ħijāz. Thereafter, it spread to Basrah and Baghdad in Iraq. It also spread to Egypt and from there to other parts of Africa including Morocco, Algeria, Tunisia and Sudan. It also established itself in Spain. It has followers in Bahrain and Kuwait.

Imām Shāf'ī's school initially spread to Egypt and then to Iraq, Iran, Khorasan, Syria, Yemen, Ħijāz, Palestine some parts of Russia and parts of India. It is the main school in Malaysia, Indonesia, Sri Lanka and the Phillipines.

Imām Aħmad's school emerged in Baghdad, then it spread to many parts of Syria and Egypt and more recently to the Arabian Peninsula. It is the school followed by the courts in Saudi Arabia.

The doors of *Ijtihād* were almost certainly shut never to be opened again. This could be attributed to:[7]

- A certain degree of self-delusion that existed within some of the scholars.
- Some scholars were eager to secure their financial situation and in trying to achieve this they were prepared to please and satisfy the leaders at all times. Some consideration was given by some scholars to the intentions of the Sultan, more especially in the Ottoman period. If the Sultan felt a certain practice should be allowed and his wish did not challenge any text from the Qur'ān and Sunnah, then this became the standard practice. Sometimes this was problematic, particularly when the Sultan tried to base things on mere conjecture and more so if he was not knowledgeable.
- The acquisition of knowledge was separated from the fear and recognition of Allah. It became a mere academic exercise.
- Sin and evil seemed to increase and trust and realibility on Allah somewhat diminished.
- A certain degree of negative bias towards ones school of jurisprudence increased.
- The authority and position enjoyed by the Judges and their own preference in matters of jurisprudence contributed to the closure of the doors of *Ijtihād*.
- Because much of the laws were documented, some scholars were not very motivated to apply themselves to try and deduce laws and verdicts.

5.2 Methodologies

In the latter years, when the colonialists started extending their arms into various Muslim Lands, we saw how Islamic scholarship in general and jurisprudence in particular suffered. The colonialists, in complying with their policy to divide and rule, promoted Orientalist Studies, whose aim was to confuse and mislead the Muslim public.[8]

This trend even influenced some Muslim scholars who studied under or may have been supervised by orientalist scholars. Some may have even denounced one of the four Imāms or Imām Shāfiʿī's monumental work, *Al-Risālah*. This trend in some way influenced the Wahhābī approach to jurisprudence. In a 'traditional' approach they claim to abandon our past scholarship and promote an attractive slogan of following the Qur'ān and Sunnah only.
People like ʿAbduh and Rashīd Riđā of Egypt tried to promote the idea of a return to a 'pure, more relevant' form of jurisprudence. They were reformist scholars and their ideas sometimes tended to have a modernist inclinataion or even possibly 'questioning' revelation with a preference for reason and rationale. Thus, even though ʿAbduh was a senior scholar and *Muftī* of Egypt he received opposition from many scholars. Shaykh Muśŧafā Śabrī (d. 1954), the Grand Shaykh of the Ottoman Empire criticized his views in a book titled *Mawqif Al-ʿAql*.[9]
Riđā on the other hand formulated some premises which seemed to help him steer a middle path between the traditionalists and the secularists. He drew extensively on a limited and minor concept in traditional legal theory. He made recourse in Ŧūfī and Shāŧibī's works and their exposition of public welfare (*maślaħah*). But as Ħallāq says that this theory constituted a radical shift from religious values of the law that the Muslim World found difficult to abandon because Riđā's alternative lacked a true religious foundation and theoretical depth that could successfully compete and match the achievements of traditional theory. Riđā even discarded *Ijmāʿ* in order to refute the ruling on apostasy.[10]

There were and are other trends but I will identify some because within a single trend there exists a variety of theories that may subscribe to a single theory or assumption. Turābī of Sudan, ʿAshmāwī of Egypt, Shaħrūr of Syria and Fazlur Raħmān of Pakistan are some examples.
Turābī treaded the path of Riđā about half a century after Riđā. He differs from others because he may be the first to categorically renounce conventional Islamic legal theory. He maintains that conventional Islamic theory may have served the purposes of classical and medieval Muslim societies, it has now become irrelevant.

He calls for a holistic approach to deal with the challenges of modern society. He maintains that early Muslim generations did not necessarily impose upon modern Muslims an exemplary model that must be in any way followed. He states that constant change is the essence of history which means that religion being inextricably connected with the historical process is ever changing. This perception allows him to dissociate modern Islamic trends from the past. He also goes on to introduce two concepts which have their root in traditional Islamic legal theory. He calls these holistic expansive analogy *(al-qiyās al-ijmālī al-wāsiʿ*) and expansive *istiśħāb* (*al-istiśħāb al-wāsiʿ*).[11]
He fails to precisely define the first and the reader is left to his own to assess its nature. He is more clear about expansive *istiśħāb* but does not provide any scriptural citation. He also fails to outline the processes for this new methodology or approach and neither does he describe the hermeneutical methods he employs. He fails to mention specific legal cases to illustrate this process.[12]

The other approach is a 'liberalist' one which aims to understand revelation in both text and context. The connection between the revealed text and modern society does not turn upon a literalist hermeneutic, but rather upon an interpretation of the spirit and broad intention behind the specific language of the texts. This is how Ħallāq has labeled and categorized the liberalist.[13]
Al-ʿAshmāwī is a person who adopted this approach. He based his theories on a number of principles. He maintains that the Sharīʿah be viewed as something aimed to serve public interest and abrogation of one verse by another serves that interest. He cites the example of the many verses revealed concerning the consumption of wine and uses this to show that such cases in which revelation was modified according to changing circumstances and social customs are many. The case of inheritance is one such example.
In another principle he discusses the category of verses. Those verses that cannot be clearly considered to have a universal import and those that have specific relevance to the person of the Prophet. Such verses require interpretation but the question is who should be entrusted with this responsibility? It seems that he

assumes the democratically elected government through its agencies has the power to decide in such matters. Beyond this vague suggestion nothing more is mentioned about this interpretation.

In another principle he affirms that religion is a pure divine idea and the religious system is a human creation based on that idea. The Sharīʿah is thus a method or way that expresses belief in God and each nation or group conceives a particular way to express its own belief in the One and Only God. He again uses the example of the prohibition of alcohol which serves as the basis for his theory for reinterpretation. He raises a few questions: (1) Is wine prohibited or must it be only avoided? This question seems to imply the need for distinction between prohibition as a legal norm and prohibition as a normal value. He however fails to develop this argument.

(2) He questions the meaning of the word *khamr* in the Qur'ān? He argues that Muslim legal scholars understood the term to refer to anything that inebriates, thus causing the consumer to lose control over his conduct and behaviour. He insists that the Qur'ān is referring only to fermented grape-juice. This is inconsistent with his own principles and he is proposing an approach that his theory cannot sustain. He also chooses to ignore the Ħadīth on inebriation.

(3) He remarks that the Qur'ān and the Sunnah did not specify a penalty for intoxication. This was prescribed by ʿUmar by analogy with the penalty for falsely accusing a person of fornication. The common factor being that the false accuser and the drunkard both utter offensive language. ʿAshmāwī maintains that the punishment must be inflicted upon the person who consumes alcohol deliberately. But if the person drinks as result of a calamity, then he is not subject to any punishment.

Dr. Ħallāq states that ʿAshmāwī's attempted solution to intoxication demonstrates the absence of an adequate methodological mechanism which can be brought to bear upon any problem. Resorting to a narrow literalist meaning of *khamr* is further proof of the failure to provide for a scheme of interpretation by which the imediate import of the texts can be transcended. He maintains that as long as the

tension between text and context remains ʿAshmāwī's legal methodology it is not likely to stand the test of practice.[14]

Fazlur Raħmān (d. 1988) aims to strike a balance between text and context, but Ħallāq maintains his weakness lies in the somewhat unclear mechanics of the application of the systematic principles derived from the revealed texts and their contexts to present situations.[15]

Shaħrūr seems to have expounded and developed Fazlur Raħmān's theory. However these scholars cite a few examples that are not representative of the cases in Islamic jurisprudence. Some fail to provide answers to situations when there is no text from the Qur'ān or Sunnah. In some instances it seems that they have not exhausted their energies in looking within the existing methodologies. The criteria they use in their criticism which appears to be based on changing social customs or even on the nature of global trends and politics is questionable. Sometimes they seem to have received some support because of the emergence of a 'new' legal profession and modern colleges which resulted in the absence of funds for traditional scholars. These lawyers knew nothing of the principles of Islāmic Jurisprudence and they bound themselves by the views and precedents of European jurists who were ignorant of Islāmic Jurisprudence. The abolishment of Islāmic Sharīʿah Courts also contributed negatively on Islāmic Jurisprudence.[16]

In most cases they failed to provide a complete workable alternative that could work globally. The traditional scholars and jurists were thus successful because their ideas were implemented on a practical level while the reformers ideas tried to justify what was taking place. The liberalist theories remain foreign to existing systems and centers of power.

Another issue that impacted on Islamic Jurisprudence was and is the absence of proper training that will enable a student to work and think like a jurist. The majority of institutions fail miserably to inculcate in the student the mentality and approach of a jurist. Some institutions adopt a good plan, but have faltered in their approach. They need to equip students in the Arabic Language and in the

Principles of Jursiprudence with a significant amount of attention on the objectives of the Sharīʿah (*maqāsid*).

However, despite this somewhat gloomy picture of the state of Islamic Jurisprudence in this period, there were some positive contributions. The recording and formal documentation of *Fatāwā* (legal rulings) enabled the individual scholar to acquaint himself with various sources in a particular school. It taught the scholars how to analyze different situations. Many of these compilations of *Fatāwā* are still used as references today. This, eventually led to the codification of the juristic rulings. With the result, the *Majallat Al-Aħkām Al-ʿAdliyah* was written that even contained weaker views in the Ħanafī School because of the consideration the scholars gave to public welfare *(maślaħah mursalah).* Because of new economic and financial transactions and the need to comply with certain government regulations for registration, the codification process had to be extended beyond the Ħanafī School. In order to achieve this, the jurists began benefiting from the principles of all the other schools as well as the views of jurists that were not necessarily attached to one of the four schools. They applied much of these principles to issues related to Personal Law.

The jurists realized that the process of *Ijtihād* is a continuous process. But because of the many requirements before one can actually engage in *Ijtihād*, they resorted to collective *Ijtihād*. A committee was commissioned to prepare a dictionary of the terminology used in Islamic Jurisprudence. In 1954, they began working on the Islamic Fiqh Encyclopaedia. By 1995, it had reached about twenty volumes and was still incomplete. The scholars also created forums where a number of jurists in a country and sometimes internationally discussed various new issues in jurisprudence. This is done through what we now know as the Islamic Fiqh Academies. Many of these academies publish their findings and rulings in annual journals.[17]

This process will expose jurists all over to different rulings and views and if we find the various academies concur on specific ruling, then this could possibly be

considered to be a contemporary form of *Ijmāʿ* (consensus). This would repel the notion made by some contemporary scholars including Dr. ʿAbd Al-Ħamīd Abū Sulaymān that *Ijmāʿ* is merely theoretical and not a reality.[18]

Notes to Chapter Five

1. Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol.2, p. 155
2. Ibid, vol.2, p. 170 also Ibn Juzay, *Al-Qawānīn Al-Fiqhiyah*
3. Al-Kawtharī, Muħammad Zāhid, *Fiqh Ahl Al-ʿIrāq wa Ħadithuhum*, p.60-81 also Qutlūbaghā, Qāsim, *Tāj Al-Tarājim*,. p. 98, 192, 234 327 and Al-Laknawī, ʿAbd Al-Ħayy, *Al-Fawā'id Al-Bahiyyah fi Tarājim Al-Ħanafiyah*, Idārat Al-Qur'ān wa Al-ʿUlūm Al-Islāmiyah, p. 164, 194 and Al-Rashīd, Muħammad ibn ʿAbd Allah, *Imdād Al-Fattāħ*, Riyadh, Maktabah Al-Imām Al-Shāfʿī, 1999, p.101
4. Al-Ħajwī, vol. 2, p. 203 also Al-Dhahabī, *Siyar,* vol. 13, p. 360, vol. 14, p.59 and Al-Zarkalī, *Al-A'lām*, Beirut, Dār Al-ʿIlm li Al-Malāyīn, 1998, vol.1, p.94, vol. 5, p. 99, 318, vol. 6 p. 230, 277, 283
5. Ibid, vol. 2, p. 324 also Al-Subkī, *Ŧabaqāt Al-Shāfʿiyyah Al-Kubrā*, Egypt, Hajr li Al-Ŧibāʿah, vol. 4, p.256-262, vol. 5 p. 165-222, 267-285, vol.6 p.191, vol. 8 p. 81-96, 395, vol. 9 p.100-123 and Al-Zarkalī, Khayr Al-Dīn, *Al-A'lām*, vol. 1 p. 178, vol. 3 p.301, vol. 5 p.46
6. Al-Ħajwī, vol. 2, p. 358 also Al-Zarkalī, Khayr Al-Dīn, *Al-A'lām*, vol. 1 p.144, vol. 3 p. 295, 316, vol. 4 p. 6, 41, 177, vol. 6 p. 56, 256, vol. 7 p. 107, 307
7. Zarqā, Muśŧafā, *Al-Madkhal,* vol..1, p. 186-200 also Al-Ħajwī, *Al-Fikr Al-Sāmī*, vol. 2, p. 391 also Zarqā, Muśŧafā, *Al-Fiqh Al-Islāmī wa Madārisuhu*, Damascus, Dār Al-Qalam, 1995, p. 88-99 also Macdonald, Duncan, *Development of Muslim Theory, Jurisprudence and Constitutional Theory*, Lahore, The Premier Book House, 1972, p. 102- 117 and Aghnides, Nicolas, *Mohammedan Theories of Finance*, Lahore, The Premier Book House, p. 112-117
8. Al-Bahī, Muhammad, *Al-Fikr Al-Islāmī Al-Ħadīth wa Śilatuhu bi Al-Istiʿmār Al-ʿArabī,* Makkah, Al-Maktabah Al-Fayśaliyah, 1973, p. 519
9. Siddiqī, Mazher Al-Dīn, *Modern Reformist Thought in The Muslim World*, India, Adam Publishers, 1993, p. 78 also Murād, ʿAbd Al-Ħakīm, *Understanding The Four Madhhabs,* Johannesburg, ʿIlmī Publications, 2003, p. 27
10. Ħallāq, Wāel, *History of Islāmic Legal Theories*, Cambridge, Cambridge University Press, 1997, p. 220 also Abū Sulaymān, ʿAbd Al-Ħamīd, *Towards an Islāmic Theory of International Relations*, Virginia, International Institute of Islamic Thought, 1993, p.67
11. Doi, ʿAbd Al-Raħmān, *Sharīʿah The Islāmic Law*, London, Ŧahā Publishers, p. also Al-Asʿadī, Muħammad ʿUbayđ Allah, *Al-Mūjaz fī Uśūl Al-Fiqh*, p. 251
12. Ħallāq, Wael, *History of Islāmic Legal Theories*, p. 230
13. Ibid, p. 231
14. Ibid, p. 241
15. Ibid, p. 245
16. Doi, ʿAbd Al-Raħmān, *Sharīʿah The Islāmic Law*, London, Ŧahā Publishers, p. 455

17. Zarqā, Muśṭafā, *Al-Fiqh Al-Islāmī wa Madārisuhu*, p.100-114 also Al-Zuħaylī, Dr. Wahbah, *Al-Rukhaś Al-Shar'iyyah*, Damascus, Dār Al-Khayr, 1993, p. 127
18. Abū Sulaymān, Dr. ʿAbd Al-Ħamīd, *Crisis in The Muslim Mind*, Virginia, International Institute of Islāmic Thought, 1993, p. 40-41

Chapter Six
Reasons for Disagreement in Islamic Jurisprudence

We have witnessed how the four schools of Islamic Jursiprudence had firmly established themselves within the Muslim community internationally. However, in the past as well as in the present there have been people who are and were critical of the schools of jurisprudence. Some are even inclined to refer to these schools as 'sects' or something that can be and should be eradicated from the Muslim society. The four schools do not oppose one another as is the case with some Christian denominations. The Catholics may not pray in a Protestant Church and vice versa. These schools and their differences are not in dogma and belief, instead they are in secondary juristic issues. In fact, Shaykh Muħammad Zāhid Al-Kawtharī (d. 1952) maintains that the jurists are basically agreed on at least two-thirds of the issues. Nicolas Aghnides maintains that differences between the schools relate to application whereas in theory they follow the same principles. He describes them as many roads leading to one goal.[1]
Despite the differences, the scholars still respected one another to an extent where we saw the likes of Imām Shāfiʿī study under Imām Mālik and various other examples of this nature throughout history.

If we understand some of the reasons for disagreement in jurisprudence, we will appreciate the process of extracting legal rulings from the sources. We will also realize that the process of *Ijtihād* is by no means an easy one and neither is it a haphazard one. Instead a refined methodology is employed by the jurists.

I will discuss the reasons for disagreement in the light of the above and the statement made by numerous scholars that maintains that the differences between the Muslim community (*Ummah*) is a mercy (*raħmah*).[2] It is also reported from ʿUmar ibn ʿAbd Al-ʿAzīz who said, "I don't desire and wish that the companions of the Prophet don't disagree. If there was only one view, people would have

been restricted and limited. In reality these people are scholars who ought to be followed. If a person followed any one of them, then this is the Sunnah."[3]

Yes, disagreement is welcome, but this is not a general ruling. The disagreement that is beyond the confines of the Sharīʿah and is not based on acceptable proof is unacceptable.

It is possible to classify the causes of disagreement in jurisprudence into three categories:

1. Disagreement because of the nature of people and their innate differences.
2. Disagreement because of the nature of the texts.
3. Disagreement because of the nature and implication of the Arabic Language.

We will endeavour to discuss some of the most important reasons for disagreement amongst the jurists without restricting these differences to a specific era or stage. The following are some of the reasons for disagreement:

1. A certain companion may have heard a verdict or ruling on a particular matter while another may not have been aware of the ruling and the latter then applied *Ijtihād*. This *Ijtihād* sometimes conformed to the Ḥadīth and at times it may not have conformed. There are times when the Ḥadīth may have not reached him at all. This also illustrates that the scholars varied in their knowledge of the Sunnah. It may be said that every single Ḥadīth did not reach every *Mujtahid*.

It is reported that Ibn Masʿūd was asked about the dowry of a woman whose husband had passed away without fixing any amount for her. He was not aware of any ruling from the Prophet in this matter. This continued for one month and after persistence from the people, he ruled that she be given a dowry equivalent to the women of her social standing. She had to complete the waiting period and she was entitled to inherit. Maʿqil ibn Yasār confirmed that the Prophet ruled in the same way in another incident. Ibn Masʿūd was overjoyed at the thought of having ruled exactly as the Prophet had done.[4]

It is reported that Abū Hurayrah was initially of the view that whoever awakes in a state of impurity, then he is not compelled to fast. He was informed by some of the wives of the Prophet of the contrary and he retracted his view.[5]

As already mentioned, there were times when the companion was unaware of the Ħadīth. Initially, Ibn ʿAmr instructed the women to untie their hair when taking a bath. ʿAishah RA heard this and exclaimed in objection, "Why doesn't Ibn ʿAmr order them to shave off their hair!" (she said this implying that there was no need for them to untie their hair).[6]

2. Sometimes they differed over the apparent implication of an action they saw the Prophet do. Some may have regarded it as an act of worship, while others may have regarded it as merely permissible (*mubāħ*).
On leaving ʿArafāt, the Prophet stopped at a place called Abŧaħ. Abū Hurayrah and Ibn ʿUmar regarded this an act of worship and devotion and thus one of the Sunnah practices of *Ħajj*, while ʿAishah regarded it as coincidence and not a Sunnah.[7]

3. Scholars may have differed because of their different conclusions and assumptions on what they observed the Prophet do.
When the Prophet performed *Ħajj*, some scholars maintained that he performed *Tamattuʿ* (to combine the practices of *Ħajj* and *ʿUmrah* by donning the *Iħrām* separately for each of the two) , while others maintain he performed *Qirān* (to combine the acts of *Ħajj* and *ʿUmrah* in a single journey).[8]

4. Sometimes the disagreement was because of the apparent incorrect retention of a Ħadīth.
Ibn ʿUmar reported that a deceased person is punished because of his family's crying over their loss. ʿAishah disapproved and maintained that the Prophet passed by a Jewish woman who had passed away while her family were mourning. The

Prophet said: “They are crying over her, but she is being punished in her grave.” She maintained that the punishment was not connected to crying.[9]

5. They differed in the manner they tried to reconcile between two apparently contradictory issues or narrations.

The Prophet prohibited anyone from facing the *Qiblah* while relieving oneself. Some scholars maintained that this ruling is a general one and was not abrogated. On the other hand, the companion, Jābir saw the Prophet relieving himself while facing the *Qiblah*. This happened a year before the Prophet passed away. Ibn ʿUmar saw him relieving himself with his back to the *Qiblah* while facing Syria. Some scholars deduced that the prohibition is confined to open areas like the desert and not to built up areas.[10]

It must be noted that abrogation necessitates that we know the date of the incident, the statement of the companion and the statement of the Prophet.

6. Sometimes differences arise from the very nature of the Arabic Language. The word *qur'* in verse 228 of Sūrah Al-Baqarah. This word means both period of cleanliness and the period of bleeding during a woman’s menses. Because of this, the jurists differed over the duration of the waiting period of a divorcee.[11]

7. The scholars differed over the reason or *ratio legis* (*ʿillat*) that resulted in a particular ruling.

An example of this is standing over the bier. Some maintained it was done out of respect for the angels that are present. Others maintained that it was done because of the severity of death. While others believed that the Prophet stood when the body of a Jew was carried past him. He did this because he did not wish that a disbeliever be higher than him.

Dr. Fatḥī Duraynī regards this as one of the most important factors contributing to differences between the jurists.[12]

8. The scholars differed over some of the conditions and requirements that render a Ħadīth as authentic (*śaħīħ*) or not.
Continuity in the chain of transmission is necessary to render a Ħadīth as authentic. The scholars however differed over the actual application and understanding of this condition. Imām Bukhārī and others maintain that it is essential for the narrator and his teacher to have met even if it was only once. While Imām Muslim and others claim that the mere possibility of meeting is sufficient. The subsequent result of this difference is that Imām Muslim may classify a Ħadīth as *Śaħīħ* and Imām Bukhārī may not. Thus the jurists that adopted Imām Muslim's view will accept the Ħadīth as evidence in an issue of jurisprudence, while those who adopt Imām Bukhāri's view may not.
Likewise, they differed over the credibility and integrity of the narrators of the Ħadīth.[13]

9. Is authenticity of the Ħadīth a pre-requisite for acting upon it? The scholars are agreed that if and when a Ħadīth is authentic (*śaħīħ*) or good (*ħasan*), then it is acceptable as evidence. However, a Ħadīth that is weak (*đaʿīf*) may be used to establish and prove that something is desirable (*mustaħab*). This is the view of majority of the scholars. There are however some scholars that permit the usage of a weak narration in issues of jurisprudence. In fact, they have preferred it to analogical reasoning (*qiyās*).[14]

10. They differed over the documentation of the words of the Prophet and the subsequent literal and figurative transmission of the Ħadīth.
In a Ħadīth reported by Abū Dāwūd, the Prophet said: "Whoever performs the *Janāzah Śalāt* in the mosque, then there is no harm."*(fa lā shay alayhi)* While, the narration reported by ʿAbd Al-Razzāq in his *Muśannaf* is as follows: "Whoever performs the *Janāzah Śalāt* in the mosque, then there is nothing for him." (*fa lā shay lahu)*

Imām Shāfiʿī and others adopted the first narration and therefore permitted the *Janāzah Śalāt* in the mosque. Imām Abū Ħanīfah adopted the narration in the *Muśannaf* and therefore discouraged the prayer for the deceased in the mosque.`[15]

11. The difference that arose because of the precision and correct spelling of a word in Arabic or even the diacritical signs on the last letter of the word.
A good example of the above is if a sheep is slaughtered following the correct Islamic procedures and out of its belly we find a dead lamb or fetus. Is it permissible to consume this with or without slaughtering it?
The Ħadīth (*Dhakāt al-Janīn dhakāt Ummihi).* This Ħadīth is reported in the nominative and the accusative form, that is the second *dhakāt* may be read with a *đammah* or a *fatħah*. Whoever reads it in the nominative form, then slaughtering the mother would suffice and thus it would be permissible to consume the fetus without slaughtering it. This is the view adopted by Imām Shāfiʿī.
While those who read it in the accusative form, then it is necessary to slaughter the fetus as well before it can be consumed. This is the view adopted by Imām Abū Ħanīfah.[16]

12. Sometimes the Ħadīth may have reached a jurist together with its cause with the result the jurist understood its implication and ruled accordingly. It may have reached another jurist without the cause, thus his understanding may differ and subsequently his verdict may differ.[17]

13. The jurist may have knowledge of something that abrogates the text in front of him or restricts and limits its implication, while another jurist may be unaware of this.[18]

14. The jurists may have differed because of different approaches or methodologies they used in extracting laws from the sources. Sometimes they differed over the use of certain aspects as reasonable and acceptable sources of jurisprudence. The

‘Practice of the People of Madīnah is acceptable in the Mālikī School and not accepted by the other schools.[19]

15. Ignorance or a deficiency in the standard of knowledge. Prior to the colonialists entering the Muslim lands, Muslims possessed high standards of scholarship. However, these colonialists soon realized that one way of dividing the Muslims and then subjugating them would be to interfere in their education under the false notion of offering them the opportunity to advance technologically. They attacked the Arabic Language and thus distanced the people from the teachings of their religion and instead promoted English and other languages or cultures. After the Muslim youth were raised in this way ignorant of their religion, they then presented to them a few selected titles on Islam from which these youth gained a very narrow and construed understanding of Islam.[20]

16. Although the vast majority of the scholars and jurists of the past had agreed on most of the requirements of *Ijtihād*, there are those who maintain that having access to thousands of Ħadīth is sufficient for *Ijtihād*. This is incorrect, because there is a need for a proper methodology. This is clearly understood from statements made by Imām Shāfiʻī and Imām Aħmad.[21]

17. The increase in the debate between the scholars of the different schools of jurisprudence, more especially when some were being used by leaders to secure their political position. Scholars also need to be sincere in their quest for knowledge and they must not be concerned with the desire for fame and recognition. Imām Mālik disapproved when Manśūr suggested that the *Muwattā* be the prescribed book for the people. When some exaggerated the concept of *Taqlīd* we saw severe disagreement and partisanship.

18. Sometimes disagreement is also a result of different environments and times. With the result, many times a jurist or a judge changed his verdict because of

different circumstances. This is apparent from Imām Shāfiʿī's 'old' and 'new' verdicts.[22]

19. A scholar or jurist may have forgotten the Ħadīth, despite having been previously aware of it. ʿUmar ibn Al-Khaŧŧāb forgot the Ħadīth concerning the permissibility of performing *Tayammum* (dry ablution) while in the state of of major impurity and without the absence of water. He was reminded about this by the companion, ʿAmmār ibn Yāsir.[23]

20. Sometimes the jurists differed in their analogy (*qiyās*).
If two people are partners in three *dinārs*. One partner contributed one *dinār* and the other contributed two. Their coins were together in such a way that it was impossible to differentiate between them. Two coins were lost. What will each partner's share be?
Abū Ħanīfah said that the remainder will be divided between them in three parts. Two-thirds will be given to the one who contributed two coins and one third will be given to the one who contributed a single coin.

Ibn Shubrumah said that the remaining coin will be divided equally between them. He was of the view that one of the missing coins definitely belonged to the person who contributed two coins and so he lost one of his coins. Every individual thus remains with a single coin. Therefore it must be divided between them equally.[24]

Notes to Chapter Six

1. Al-Kawtharī, Muħammad Zāhid, *Al-Lāmadhabiyah Qantarah Al-Lādīniyah*, (photocopy), p. 6 also Silqīnī, Dr. Ibrāhīm, *Asbāb Ikhtilāf Al-Fuqahā*, Abū Dhabī, Manār Al-Islām, 1991, p.12 Aghnides, Nicolas, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography*, Lahore, The Premier Book House, p. 109

2. Al-Sakhāwī, *Al-Maqāsid Al-Ħasanah*, also ʿAwwāmah, Muħammad, *Śafaħāt fī Adab Al-Ra'y,* Jeddah, Dār Al-Qiblah, p. 32

3. Zarqā, Muśtafā, *Al-Madkhal Al-Fiqhī Al-'Aām,* 1967, p. 212

4. Al-Dehlawī, Shāh Walī Allah, *Al-Inśāf fī Bayān Asbāb Al-Ikhtilāf*, Beirut, Dār Al-Nafā'is, 1986, p. 23 also Al-Nisā'ī, *Sunan, Kitāb Al-Nikāħ*, Ħadīth No. 3360

5. Al-Dehlawī, Shāh Walī Allah, *Al-Inśāf fī Bayān Asbāb Al-Ikhtilāf*, p.23 also Al-Tirmidhī, *Sunan*, Book of Fasting, Ħadīth No. 779

6. Muslim, *Śaħīħ*, Book of *Ħayđ* (Menses), Ħadīth. No. 747 and Ibn Mājah, *Sunan*, Book of *Ŧahārah*, Ħadīth. No. 604

7. Al-Dehlawī, Shāh Walī Allah, *Al-Inśāf fī Bayān Asbāb Al-Ikhtilāf*, p.27 also Muslim, *Śaħīħ*, Book on *Ħajj*, Ħadīth No. 3167, 3168, 3169

8. Ibid, p. 28 also Al-Tirmidhī, *Sunan, Kitāb Al-Ħajj*, Ħadīth No. 822 and Ibn Mājah, *Sunan, Kitāb Al-Manāsik*, Ħadīth No. 2971

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Conclusion

The methodology of the Qur'ān is such that in most cases it deals with the broader principles and does not delve into specifics. This then makes it possible for future generations to continue extrapolating laws from the principles enshrined in the Qur'ān. We are well aware that because of public welfare (*maślaħah*) etc a certain ruling may change when certain conditions change. Therefore issues which the Qur'ān has discussed in somewhat detail was to show human beings that such issues will never change. This further reaffirms the point that these are not open for *Ijtihād* and include issues related to inheritance, family matters and some of the punishments for major crimes.

Once we have understood the above, we will understand the need for the Sunnah which clarifies and provides detail on many principles in the Qur'ān. Having said this, we must note even though the Prophet provided us with detail in many aspects of our lives, there is still a substantial amount that requires continuous *Ijtihād*. This helps us understand the Ħadīth reported by Abū Dāwūd wherein the Prophet said: "Indeed Allah sends for this community (*Ummah*) at the head of every hundred years one who will revive and renew for it its religion."[1]

We have observed through the various stages in the development of Islamic Jurisprudence that the legists followed a methodology that has its roots in the life of the Prophet Muħammad. Over the centuries there were various factors that influenced the nature of Islamic Jurisprudence until we eventually saw the emergence of the four schools of jurisprudence which withstood different obstacles and ultimately became firmly rooted and established within the Muslim community. The development of Islamic Jurisprudence was not without disagreement. However, the disagreement did not result in conflict.

Another point of note is that when the concept of the *Khilāfah* was abandoned and the orientalists began spreading, there were and still are scholars who are making the call for Muslims to abandon the four schools of jurisprudence. Some

like Ħasan Al-Turābī, Al-ʿAshmāwī and Suħrūr even maintain that the Principles of Jurisprudence (*Uśūl-Fiqh*) are an obsolete science that fails to meet the requirements of the modern age.[2]

However after carefully studying the development of Islamic Jurisprudence, we will find that even in later centuries when Islam spread to other parts and when the Muslims interacted with other communities and cultures, new and unprecedented issues arose. Yet these issues were adequately dealt with and practical and workable solutions and verdicts were provided from the Principles of Jurisprudence.

There are those who claim that the ideal solution is to return to the Qur'ān and the Sunnah without the need for the four schools of jurisprudence. This too is problematic as it opens the door for unregulated *Ijtihād* and allows for unqualified individuals to attempt to deduce laws from the divine text.
We must be aware that the process of *Ijtihād* is based on a documented and researched methodology (*Uśūl-Fiqh*). The skills and tools utilized by the jurist are both acquired and inspired and thus this is not possible for someone who claims to merely have access to large numbers of Ħadīth to be a jurist.

The four schools of jurisprudence are not a negative aspect in our religion. Instead, they are healthy because these schools provide us with a wealth of literature. They assist us in situations when a single school failed to provide an adequate solution for a problem. When this happened then scholars and jurists from one school looked towards one of the other schools.
The differences and disagreement were not based on individual wishes or even partisanship, instead they were the result of precise principles that were formulated with the sole intention of arriving at the truth and gaining the pleasure of Allah. This disagreement must never be a reason and cause for disunity. If and when this happens then this is due to ignorance of the spirit and nature of the Sharīʿah, its evidences and the teachings of its scholars.

To discard or abandon a single school is tantamount to transgression towards Islamic scholarship and the Sharīʿah, let alone the resulting conflict and dispute between Muslims which is abhorred in Islam.[3]
However appealing the call to return to the Qur'ān and Sunnah without the four schools of Jurisprudence may sound, we must ask ourselves if the views or *Ijtihād* of the scholars of the four schools really and truly goes beyond the scope of the Qur'ān and the Sunnah to impress the need for a 'new' jurisprudence? We must be mindful of the Ħadīth which states the Muslim community (*ummah*) will never unite or confer on something which is deviant or misleading.[4]
Shaykh Muħammad Fawzī Fayđ Allah maintains that the Qur'ān, Sunnah, consensus of the legal scholars (*Ijmāʿ*) and analogical reasoning (*Qiyās*) are our primary sources, but asks if we have produced such capable and competent scholars who are able to use the principles of jurisprudence to adequately deal with new issues. It is easy to ridicule former scholars, but it is very difficult to reach their level, let alone surpass them.[5]

The critics of Islamic Jurisprudence and its Principles have to date not provided a workable alternative. This is largely a futile task because the Principles of Islamic Jurisprudence, if studied properly and applied correctly together with its related sciences are more than sufficient to deal with issues we encounter daily. This has been echoed by the renowned specialist on the Principles of Islamic Jurisprudence, Shaykh Dr. Wahbah Al-Zuħaylī and also by Shaykh Muħammad Ħabīb Khojah of the International Fiqh Academy in Jeddah.[6]
The system adopted in the past produced excellent scholars unmatched today despite our technological advancements. The past system produced experts in different centuries and in different regions.

There are areas of weakness, but there are some ways of overcoming these problems. Many of these suggestions are made by leading contemporary jurists and legists.

Firstly, we must revisit the time allocation and approach to the study of Islamic Jurisprudence.
We need to study Islamic Jurisprudence from its original sources and dedicate longer time to mastering the texts. We need to then present it to the public in an easy form similar to that of the *Majallah*. We need to shorten the study period for comparative jurisprudence for under-graduate students and rather allocate the time for mastering a single school. Students may be encouraged to edit manuscripts in issues of jurisprudence.[7]
Shaykh Dr. Abū Al-Fatħ Al-Bayānūnī added to the above the need for students to study and familarise themselves with the proofs and evidences of one single school. This will be achieved with the help of one good reliable commentary in the respective school. He goes on to say that after the above has been accomplished, students may study the proofs from other schools and attempt to arrive at the strongest ruling. This is to be attempted by students who have completed the above and have a research acumen.[8]
Shaykh Muśŧafā Zarqā maintains that indepth and detailed research in specific issues is healthy because it exposes us to views that were previously unknown or not documented. This further stimulates the thought processes and assists in codifying the laws. We also need to incorporate studies in conventional law and economics. The Fiqh Encyclopedia that was started in 1956 was a positive start in this direction.[9]
Dr. Ŧahā Jābir Al-ʿAlwānī acknowledges the failure of many of our Islamic institutions but maintains that all of the above is possible if and when we direct talented youth to study with accomplished scholars who are an embodiment of piety and knowledge. These scholars also need to combine their studies of Islamic Jurisprudence with modern sciences.[10]
Shaykh ʿAwwāmah adds to this saying that students must be mindful of the etiquettes taught to us by the scholars of the former generations that include respect for the teachers, the possibility that one's own *Ijtihād* may be being wrong. This will make the person willing to listen other views. Students must be

willing to dedicate a long time because acquiring sound knowledge is a gradual process.[11]

Dr. Wahbah Al-Zuħaylī maintains that scholars and jurists must be mindful of a few fundamental issues: (1) The Sharīʿah is intrinsically connected with Islāmic dogma. The jurists must remember that they like everyone else are unswerable to Allah. (2) All efforts should aim towards producing a good and truthful Muslim in faith and practice who will contribute positively to the society. (3) The jurists must be informed about all new developments. This will enable them to provide the Muslims with a ruling or even an alternative.

He recommends greater reconciliation between the text (*naśś*) and public welfare (*maślaħah mursalah*) which could even be used to specify the probable and general verses of the Qur'ān with a certain and definite *maślaħah*. An example is the prohibition of monopolizing on food, clothing and other items if it will be a means of harm to the general public.
He welcomes *Ijtihād* in some of the Principles of Islāmic Jurisprudence about which the jurists and legists have differed. For example do all commands imply that something is compulsory (*wājib*)?
Another example he cites is that when we look at the Sunnah, we could try and differentiate between what was done by the Prophet in his capacity as an Imām and what he did in his capacity as a leader or statesman.
He also calls for more extensive research in the intent and objectives of the Sharīʿah (*maqāsid*) with due consideration for the fact that every law has been instituted for the benefit of mankind. The jurists must identify such benefits that concern the greater community and not individuals and these benefits must not conflict with any conclusive text. He maintains that scholars need to continue and expand on the approaches by Al-Shāŧibī in *Al-Muwāfaqāt* and Al-Qarāfī in *Al-Furūq*.[12]

All the scholars cited above reaffirm the need to remain within the boundaries of the four schools together with a more organized effort towards collective *Ijtihād* which may be realized though the Fiqh Academies. These academies need to revisit and study the principles of Islamic Jurisprudence and the objectives and intent of the Sharīʿah with special attention on the application of secondary sources like public welfare (*maślaħah mursalah*) etc.

These academies will comprise of scholars and jurists who collectively fulfill the requirements of *Ijtihād*.[13]

Muftī Taqī ʿUthmānī also mentions that in this age when Muslims are faced with many problems there can be nothing more detrimental than bickering over some subsidiary issues. Some may exploit these very differences to dismantle the foundation of Islam. History bears witness that it was the internal feuds that resulted in the eventual collapse of Muslims.[14]

There are number of new issues which we are faced with and the jurists and legists need to study these to provide the Islāmic verdicts on these. One such issue is the issue of cloning.

I will attempt to provided the Islamic perspective on cloning considering the recommendations I made in this chapter.

We must remember that because the issue of cloning is a new one about which there exists no clear and explicit text from the Qur'ān and the Sunnah, we have to resort to using the secondary sources like blocking the ways (*sadd al-dharīʿah*) and public welfare (*maślaħah mursalah*). We also need to draw from the objectives of the Sharīʿah and the Fiqh maxims.

The conclusion is further supported by the verdicts of some renowned scholars of Islamic Jurisprudence and acclaimed Fiqh Academies. The final verdict may be regarded as a contemporary form of consensus (*ijmāʿ*).

The process involved in the development of the embryo into a full human person is mentioned in the Qur'ān in Sūrah Al-Mu'minūn, verses: 12-14. "And indeed We created man out of an extract of clay. Therafter We made him a drop

(*nuṭfah*) in a safe lodging. Then We made the drop into a clot, then We created of the clot a tissue, then We created of the tissue bones, then We covered the bones in flesh and then We brought it forth as another creation. So blessed is Allah, the Best of Creators."

From these verses, some of the conclusions that may be drawn are:[15]

1. Human creation is part of the Divine will that determines the embryonic journey to a human person.
2. Life is possible at the later stage in the biological development of the embryo.
3. It raises the question as to whether or not the fetus should be accorded the status of a legal person once it lodges in the uterus.
4. It allows for a possible distinction between a biological and a moral person because of the silence of the Qur'ān over when ensoulment occurs.

Cloning on the other hand is to make a duplicate copy of the original living thing. It is not the creation of a new life.[16]

It involves taking a living cell from a plant, animal or human then removing the nucleus of that cell and implanting it in a female's egg after taking out the nucleus of that egg. Thereafter a process is followed to combine the nucleus of the cell with the egg. After they are joined it is implanted in the females womb to grow. The impregnation takes place between the human body cells.

Every cell has 46 chromosomes which is the genetic substance that carries all inherited characteristics. Every sexual cell in both man and woman has only 23 chromosomes. In natural fertilization the 23 chromosomes from the man joins with the ovum of the woman which has 23 chromosomes. Hence a total of 46 results and therefore the baby will take from the characteristics of both the man and the woman.

In the cloning procedure, the cell taken from the body has 46 chromosomes which includes all the inherited characteristics of that person. Thus the baby born

as the result of the cloning procedure inherits the characteristics of the person whose cell's nucleus was used.
Cloning may be done with or without a male by using body cells and not sexual cells. This is done by taking a body cell from a female. The egg is implanted in a woman's womb and it then starts to grow. When it is born, it will be a duplicate of the female from which the cell was taken.

In natural fertilization, the characteristics that are inherited are taken from the father and the mother. As a result the children will not be identical. The similarities take different forms in terms of height, profile, mental abilities and congenital psychological characteristics.
Inheritance in the case of cloning results in the transfer of all characteristics of the person whose cell was used. Thus the newborn will be a duplicate and will inherit all congenital characteristics. However gained characteristics are not subject to inheritance, because they were gained and not congenital with that person.

Another kind of human cloning is foetal cloning. This is done by making a duplicate of the foetus which is formed in the womb of the mother. In this process one can make clones of his children during the foetal period. This will result in twins born out of this foetal period.

Cloning has already been done in plants and recently in animals. It has not been done with humans yet.
The aim of cloning plants and animals is to improve quality and quantity and to possibly find a natural cure for human diseases, especially acute ones. This is permissible and even recommended because seeking a cure is encouraged by the Prophet.[17]
In a Ħadīth reported by Usāmah ibn Sharīk who said: "I was with the Messenger when Bedouins came to him and asked": "O Prophet, should we seek a cure for our illness?" He said: "Yes, O servants of Allah, seek a cure, Allah Almighty did not creat a disease without creating a cure for it."[18]

However cloning animals must be controlled and monitored because it may open the door to abuse and cruelty to animals. In the case of Dolly, the cloned sheep, they experimented on 277 sheep.[19]

As regards human cloning we must keep in mind that this issue deals with life and human existence. The process involves the intellect and affects procreation, family and religion. Our religion is known through revelation and understood through the intellect. Thus this process involves the objectives and intents of the Sharīʿah (*maqāsid*).

Furthermore, Islām regards interpersonal relationships as fundamental to human life. Therefore there would be almost certain unanimity on the therapeutic uses of cloning as long as the lineage of the child remains unblemished and this process serves as an aid to fertility.[20]

Other than the above, the harms in human cloning seem to outweigh the benefits. Some of these harms are:

1. The production of children in cloning is different from the natural way that Allah has made humans reproduce.[21]
2. The children born out of cloning without males have no fathers. In addition, they may not even have mothers if the egg was placed in the womb of a female different from that female whose egg was used in the process. The female whose womb was used is no more than a place to house the egg. This will lead to the loss of that human because he has no mother and father. It goes against Sūrah Al-Ħujurāt, verse: 13 "O mankind! We have created you from a male and a female, and made you into nations and tribes so that you may know one another. Verily the most honourable of you with Allah is the one who has the most piety (*taqwā*). Verily Allah is All-Knowing, All-Aware."

The Qur'ān declares sex-pairing to be a universal law in all things. Allah says in Sūrah Al-Dhāriyāt, verse: 49 "And of everything We have created pairs that you may remember." Thus cloning involves technically created incidental relationships without requiring spiritual and moral connections between a man and a woman.

3. Cloning will result in the loss of kinship because if the cells were implanted in the womb of a foreign or strange woman or in the womb of the husband's second wife, then these two forms will result in the loss of kinship and Islam has prohibited this. Situations may arise when a woman may be pregnant with two children from two separate origins. This may confuse lineage.

   The Prophet is reported to have said: "Anyone who makes a claim for somebody other than his father and he knows that he is not his father, then Paradise is forbidden for him."[22]

In another Ħadīth, the Prophet said: "Any woman who introduced to some people an offspring that does not belong to them, then she has nothing to do with Allah and she will not enter Jannah and any man who denies his son while looking at him, Allah will not reveal Himself to him and Allah will disgrace him in front of the first and last generations."[23]

4. In the light of the manipulation of genetic engineering for hugenics, the possibility of political abuse of the technology exists. It may motivate some people to "produce' people who are outstanding in terms of intelligence, health and physical beauty. With the result cells would be taken from selected males or females. This will also lead to the loss of kinship and may also result in the concept of a 'preferred or superior' race.

   Whereas the different nations and tribes and their colours and languages is one of the signs and manifestations of Allah's power.[24]

5. The production of children through cloning will prevent or complicate the application of many fundamental Islamic rules and obligations such as the rules of marriage, alimony, inheritance, custody of children and *maħārim*. It may eventually stamp out the role of marriage and the family.[25]

6. Because the process of cloning involves interfering with cells (by freezing and implanting), there exists a possibility of new diseases developing or the children may inherit existing diseases. Unnatural interference in the genes may even lead to some forms of cancer.[26]

7. This process could even open the door to trading in genes or what may be termed as 'rented wombs'.[27]

8. Cloning human beings would require much experimentation and these would have to be carried out on humans. This is disgracing and degrading because human beings would be subjected to some of the same tests and experiments that are usually carried out on plants and animals. Humans are not objects like the components of a car. Allah the Almighty has afforded them dignity and respect.
   The risk factor in these experiments is high because some scientists have recorded a 3,4% success rate in the experimentation on cloning.[28]

In the light of the above, it is recommended that scientific research be directed to areas where there is greater certainty and it could be a positive assistance and service to human existence.
Therefore the juristic ruling on cloning will have to consider equity (*istiħsān*) and blocking the ways (*sadd al-dharī'ah*) and various other Fiqh maxims.[29]
When these are applied to the issue of cloning we deduce the following:

1. The maxim that reaffirms the need to protect the individual and prevent him from distress and constriction (*raf'u al-ħaraj*). The experimentation will subject the individual to distress.

2. A Muslim is one who must refrain from causing harm to himself and to others (*lā đarar wa lā đirār*).
3. We must try to avert all causes of corruption as this has precedence over bringing about benefit (*dar'u al-mafāsid muqaddam 'alā jalb al-maśāliħ*).
4. The means to achieve something must not be Ħarām. Therefore one cannot remedy the problem of poverty by stealing (*mā yatimmu al-ħarām illā bihi fa huwa ħarām).*
5. Even if we were to consider the principle that permits something Ħarām at times of necessity, we must remember that a necessity cannot be averted with something worse *(al-đarūrah lā tuzāl bi ashadd minhā).*
6. The procedure in question must not infringe on any of the five essentials and objectives (*maqāsid*) of the Sharīʿah.

In the light of the above, it is preferable that we adopt a cautious or even a prohibitive attitude to cloning beyond infertility or the assessment of genetic or other abnormalities. It is worthy to note that Shaykh Dr. Yūsuf Al-Qarađāwī, the former Muftī of Egypt, Nāśir Farīd and other scholars including the International Fiqh Academy in Saudi Arabia and India have all prohibited it.[30]

Notes to Conclusion

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23. Al-Dārimī, *Sunan* a similar narration is reported by Ibn Mājah, *Sunan*, Chapter of Inheritance, Ħadīth no. 2743, also Al-Nisā'ī, Chapter on Divorce, Ħadīth 3511

24. Sūrah Al-Rūm, verse: 21

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